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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

REPUBLIC OF FRANCE AND COMPAGNIE GENERALE TRANSATLANTIQUE

PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 5, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 171 F. Supp. 497. The opinions of the Court of Appeals are reported at 290 F. 2d 395 (App. *infra*, p. 19).

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on May 5, 1961 (App., *infra*, p. 37). A timely petition for rehearing *en banc* was denied on

July 11, 1961 (App., *infra*, p. 38). By order dated October 9, 1961, Mr. Justice Black extended the time for filing a petition for certiorari to and including December 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether under general maritime law a shipowner is relieved from liability for injuries which were the foreseeable result of negligence in creating a risk of fire when the injuries are in fact the result of an unforeseeable explosion caused by the fire.

2. Whether federal maritime law or local state law determines the rights of a shipowner to exoneration or limitation of liability from explosion damages on navigable waters and on shore caused by negligent acts done on navigable waters.[1]

STATUTE INVOLVED

The Admiralty Extension Act, 62 Stat. 496, 46 U.S.C. 740, provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of

[1] If certiorari is granted, we reserve the right to present argument on the following, additional questions:

"Whether the shipowner's violation of the Dangerous Cargo Act constituted negligence *per se*.

"Whether proof of foreseeability is necessary to recovery on a theory of unseaworthiness."

law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this act [June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT

BACKGROUND OF THE LITIGATION

This case originated in a petition brought in admiralty, pursuant to the Limitation of Shipowners' Liability Act, 46 U.S.C. 183 *et seq.*, by the respondent Republic of France and the respondent Compagnie Generale Transatlantique (hereinafter called the "French Line"), owner and operator of the ss GRANDCAMP, for exoneration or limitation of their liability arising out of the fire and explosion on that vessel at Texas City, Texas, on April 16, 1947. The potential liability for wrongful death, personal injuries and property damage from which the owners seek to be exonerated is $75,000,000.

The GRANDCAMP was moored at a pier in the harbor at Texas City, Texas, in the midst of a highly concentrated industrial complex of gasoline tank

farms, chemical plants, and petroleum refineries. She was taking on a cargo of ammonium nitrate fertilizer (FGAN) which had been manufactured for the United States under a government-sponsored fertilizer production program. Just after work started on the morning of April 16th, when the hold was about half filled, a small fire broke out in the cargo in #4 hold. 171 F. Supp. at 504. The fire was not promptly extinguished in its incipient stage, because the master ordered that no water be put on the fire. 171 F. Supp. at 508–509. The master battened down the hatch and injected live steam under pressure into the hold, whereupon the fire developed into an uncontrollable inferno forcing the crew and the longshoremen to abandon ship (171 F. Supp. at 504, 509). Shortly thereafter, the cargo exploded, spreading the fire and burning debris over the waterfront. Fire raged through refineries, gasoline storage tanks, chemical plants, and other structures in the port area for several days thereafter. The catastrophe resulted in more than 500 deaths, more than 3,000 personal injuries, and widespread destruction throughout the port area (171 F. Supp. at 500, 504–505). It is the government's belief that a substantial part of this damage took place within the immediate vicinity of the dock area, where similar destruction by fire could have been anticipated even had there been no explosion of the FGAN.

The petition of the Republic of France and La Compagnie Generale Transatlantique to limit their liability to the value of their interest in the GRANDCAMP, or to exonerate them from liability for the

disaster under the Limitation of Liability Act, 46 U.S.C. 183 was filed in the District Court for the Southern District of Texas on October 17, 1947. Several thousand victims of the Texas City disaster promptly brought claims against the respondents. The trial upon the issues presented was delayed pending the disposition of suits brought against the United States under the Federal Tort Claims Act, predicating liability "on the participation of the United States in the manufacture and transportation of FGAN." The negligence charged in these Tort Claims Act suits "was that the United States, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions." *Dalehite* v. *United States*, 346 U.S. 15, 23.[2] In 1953 this Court held that the United States was not liable on the ground that the claims came within the exception to the Tort Claims Act for discretionary functions. *Dalehite* v. *United States*, 346 U.S. 15.

Congress then enacted the Texas City Disaster Relief Act, August 12, 1955, 69 Stat. 707, under which the United States made payments to the un-

[2] On the issue of negligence the United States argued that it had no duty to warn that FGAN was a dangerous explosive because (1) both the ICC and the Coast Guard, in their regulations concerning the handling and transportation of dangerous materials, only classified ammonium nitrates as oxidizing agents, or fire hazards and (2) at the time of the accident, it was generally believed that nitrates such as FGAN would not explode under normal transportation conditions, but would require subjection to severe shock, such as the detonation of TNT, or exposure to very great heat and pressure.

insured disaster victims as gratuities but in amounts not exceeding $25,000 for any single loss. Pursuant to the provisions of the statute, the United States obtained assignments from the victims of all their rights of action against third parties. The United States then filed a claim in these proceedings as statutory assignee, and the district court dismissed the claims of the several thousand victims who had previously filed claims in the proceeding (171 F. Supp. at 501). The rights of action of the victims against the GRANDCAMP were thereafter prosecuted by the United States. The United States claims $350,000 damages in its own right for the loss of government property stored in a warehouse adjacent to the pier at which the GRANDCAMP was moored.

THE DISTRICT COURT PROCEEDINGS

Since this was a proceeding for the limitation of liability or exoneration pursuant to 46 U.S.C. 185 and Admiralty Rule 53, the court deferred consideration of the nature and merits of the several thousand individual claims until after it determined whether the disaster was caused by fault or negligence within the privity of the respondents.

After hearing evidence on this limited question the district court entered an interlocutory decree denying the petition for exoneration from or limitation of liability on the ground that faults and negligence within the privity and knowledge of the respondents caused the fire and the resulting damage. Its significant findings may be summarized as follows:

Since 1945 the Republic of France had known that FGAN is composed of 95 percent pure ammonium nitrate. Ammonium nitrate "has long been known and recognized * * * by all informed persons in the transportation industry, as an 'oxidizing agent' and a *fire* hazard" (171 F. Supp. at 503). Since long prior to 1947 this product has been classified by the Coast Guard as a "dangerous article" within the sub-class of "inflammable solids and oxidizing materials"[3] (ibid.). Ammonium nitrate was and is not classified as an explosive, however, because it is not considered probable that it will explode under normal transportation conditions.

Neither the master of the SS GRANDCAMP nor anyone else took adequate precautions to prevent smoking aboard the vessel, with the result that "longshoremen were permitted to, and did, smoke promiscuously" (171 F. Supp. at 507) in the holds containing FGAN. The fire originated in a carelessly discarded cigarette or match. The master was also negligent in accepting the FGAN aboard the vessel in broken containers in violation of safety regulations promulgated under the Dangerous Cargo Act which prohibits the acceptance of oxidizing agents in broken containers, 46 C.F.R. 146.02–14, and this viola-

[3] As the district court stated (171 F. Supp. at 503): "An 'oxidizing material' or 'oxidizing agent' is one which, while not necessarily inflammable itself (decomposes when brought in contact with burning organic matter, and releases oxygen in quantity, thus supporting and encouraging the fire, and causing a more rapid rate of combustion, and an increase in temperature (46 C.F.R., 146.22–3)."

tion increased the susceptibility of the stow to fire. The master was negligent again in fighting the fire with the vessel's steam smothering system. The effort to exclude air from the hold by steam was obviously futile because the FGAN itself supplies the oxygen necessary for combustion. Dousing is the accepted method of fighting a fire in the presence of oxidizing substances. Finally, the court found that the Republic of France was negligent because it did not inform the master of the dangerous nature of the cargo and that the GRANDCAMP was unseaworthy within the privity of the respondents in that she was improperly manned and stowed.

Although these findings of fault and privity would in themselves warrant a denial of a petition for limitation of liability or exoneration, since the remaining issues of proximate cause and damage were triable in the case in chief, the district court went further and found that each of the negligent acts constituted a proximate cause of the disaster. In particular, the court held that the negligence of the master in failing to promulgate and enforce "no smoking" regulations was the proximate cause of the fire, the explosion and all the ensuing damage. The " 'foreseeability' test is met," the court concluded, because, while "an explosion *of this sort*" was not foreseeable, the master could have "anticipated the danger of a disastrous fire" and "it is not necessary to foresee the *extent* of the damage which may ensue" (171 F. Supp. at 508–509 and fn. 8).

THE DECISION OF THE COURT OF APPEALS

The Fifth Circuit, sitting *en banc*, reversed the district court, without disturbing its findings of negligence or privity, on the ground that, under Texas law, damage caused by the explosion could not be attributed to the negligence of the respondents who, under the findings of the district court, could only be reasonably expected to have foreseen "a disastrous fire" (171 F. Supp. at 508) and not the explosion. The court of appeals directed the district court "to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the explosion of the steamship Grandcamp" (App., *infra*, p. 32). Judge Hutcheson dissented.

The United States petitioned for a rehearing *en banc*, but the petition was denied without opinion, Judge Hutcheson again dissenting.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to insure that justice is done in administering the rules of tort liability in one of the major disasters in recent decades. The negligence of the owners and master of the SS GRANDCAMP caused 500 deaths and 3000 personal injuries. There was also vast property damage. The claims encompassed by assignments to the United States total $70,000,000. It seems self-evident that this Court would grant certiorari to review the basic legal issues if individual suits on the claims were pending in scattered federal courts. Although the consolidation of all claims in one court eliminates the possibility of inconsistent rulings, this factor hardly reduces the importance of opening up every avenue for insuring that justice is done in a situa-

tion involving so many people and such large claims. Although the United States is the present owner of the claims, it is fair to assume that Congress would not retain the recovery as a shrewd bargain but, after deduction of sums already paid as gratuities and the costs of recovery, would provide for its distribution to the actual sufferers.

The court below misconceived the issues. Its decision is contrary to established principles of tort law, even as applied in decisions conservatively limiting liability. The court also committed plain error in failing to apply the Admiralty Extension Act of 1948 and federal maritime law.

1. The court of appeals took as its major premise the precept that "[i]n Texas, as elsewhere, not only proximate causal connection but also the very existence of a duty the breach of which will constitute actionable negligence depends upon reasonable foreseeability of consequences" (App., *infra*, p. 27). Its minor premise was that the explosion of the SS GRANDCAMP was not reasonably foreseeable. From this it concluded that "petitioners are not liable for any claim arising out of or consequent upon the explosion of the steampship Grandcamp" (App., *infra*, p. 32).

The supposed syllogism is a *non sequitur*. The court confused the question whether the defendant should reasonably have foreseen that his conduct might cause injury to the plaintiff with the question whether the harm to the plaintiff must occur through a foreseeable chain of events. These two questions must be kept distinct. There can be no negligence unless the defendant creates a foreseeable risk of harm

to some person or property. The modern view, to which the Texas courts apparently subscribe, is that the actor is not liable unless his alleged negligence creates a foreseeable risk of harm to the plaintiff. Restatement of Torts, Sec. 281, *Comment c.*; *Palsgraf* v. *Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99. We too accept this proposition. No one denies that this requirement can be satisfied in the present case with respect to a great number of the claims, for the Fifth Circuit did not dispute the district court's finding of foreseeability of "a disastrous fire" (171 F. Supp. at 508).[*]

Once the foreseeability of harm to the plaintiff is established, however, the defendant may be liable even though the particular chain of events through which the harm occurred was unforeseeable. The most that is required, even by those decisions which conservatively limit liability, is that the harm to the plaintiff must be within the general type of harm to the foreseeable risk of which the plaintiff was subjected by the defendant's negligent conduct. All the authorities concur in this view. II Harper & James, *The Law of Torts*, 1147–1149 (1956); Seavey, *Principles of Torts*, 56 Harv. L. Rev. 72, 91 (1942); *Mansey* v. *Webb*, 231 U.S. 150 (Holmes, J.); *Virginian Ry. Co.* v. *Viars*, 193 F. 2d 547 (C.A. 4); *Stanolind Oil & Gas* v. *Brown*, 62 F. 2d 398 (C.A. 5); *Johnson* v. *Kosmos Portland Cement Co.*, 64 F. 2d 193 (C.A. 6); *Interlake Iron Corp.* v. *Gartland S.S. Co.*, 121 F. 2d

[*] Moreover, in this case the Shipowner owed a statutory duty under the Dangerous Cargo Act, to the general public in the port area where dangerous cargoes were being handled. The violation would be negligence *per se*.

267 (C.A. 6), certiorari denied, 314 U.S. 681; *Hill* v. *Winsor*, 118 Mass. 251; *Bunting* v. *Hogsett*, 139 Pa. 363. Thus, Section 435 of the Restatement of Torts states in *Comment a.*—

> The fact that the actor, at the time of his negligent conduct, neither realized nor should have realized that it might cause harm to another in the manner in which it occurred, is not of itself sufficient to prevent him from being liable for the other's harm if his conduct was negligent towards the other and was in all other particulars a substantial factor in bringing about the harm.

In the present case neither the district court nor the court of appeals examined the merits of any particular claim. The sole question was whether respondents were guilty of negligence resulting in liability to *some* claimants from which they could not be exonerated. The order of the court of appeals can stand only if respondents were not liable on *any* claim presented.

Applying the principles set forth above, it seems plain that respondents were negligent toward at least some of the persons injured. A number of them were present themselves or owned property within the immediate vicinity of the dock where the SS GRANDCAMP was moored. The negligence of the master, in failing to prevent smoking, in violating the Coast Guard regulations prohibiting stowage of oxidizing material in broken and leaking bags and in failing to fight the fire by accepted methods, created an unreasonable risk that an uncontrollable fire would break out and injure persons and property in the area. It is also apparent

that those toward whom respondents were negligent might be injured in any one of a number of ways. Fires are too dangerous and too unpredictable to foresee the precise injury or exact chain of events. This was particularly true in the circumstances in which the respondents were negligent. The SS GRANDCAMP was moored in the midst of a concentrated area of chemical plants, petroleum refineries and tank farms. She lay adjacent to two piers loaded with ammonium nitrate, which was widely known as a dangerous combustible substance, and only 300 feet from the plant of Monsanto Chemical Company. She was 400 yards from a large grain elevator and only 800 yards from the tank farm and oil docks of the Carbide & Carbon Co. To create the risk of fire in the presence of dangerous oxidizing material in the midst of this industrial complex created a wide range of risks to those in the vicinity. Respondents therefore became liable to those to whom injury was foreseeable when the same general type of harm occurred, even though the precise type of harm and exact chain of events—the detonation of the vessel—was not to be anticipated.

To make the point precise, consider the situation of valuable property located within the vicinity of the dock where the SS GRANDCAMP was moored. It was foreseeable that fire would break out and become uncontrollable as a result of either the failure to enforce no-smoking regulations or the omission of proper methods of fighting the fire once it broke out in the hold. Thus, the risk that the property would

be damaged was foreseeable and respondents' claim is reduced to the assertion that the property, instead of being consumed in any one of the ways incident to a large and uncontrollable fire, was destroyed by concussion or the holocaust resulting from explosion. The answer is insufficient under the principles outlined above, but it is also invalid for another reason. The chemical plants and tank farms in the vicinity made it quite likely that explosions of some kind would occur in the area. No one can seriously suggest that, although the respondents would be liable because they could and should have foreseen that an uncontrollable fire might result and spread to a chemical plant or tank farm and cause an explosion which injured property in the vicinity, they are not liable for the injury to that property which occurred through explosion of the vessel. In each instance there was an "explosion risk." Respondents are therefore liable for the damage done to the property by explosion even though they could not foresee the explosion that actually occurred.

The court of appeals was largely influenced by what it erroneously supposed to be the inconsistency of the United States in first denying liability in the *Dalehite* case upon the ground that it was not negligent in failing to foresee an explosion and then seeking to impose liability upon the SS GRANDCAMP and the French line. A technical answer is that although the United States argued that an explosion was not foreseeable, the issue is not *res judicata* both because the point was not decided by the Supreme Court and because there is no identity of parties to the two litigations. We fully agree, however, that it

would be unbecoming for the United States to assert inconsistent positions first in defending itself and later in seeking to impose liability upon others. The full answer is that there is not the slightest inconsistency in the government's position. In *Dalehite* it argued that there was no negligence in the manufacture of the FGAN, that all the carriers and handlers had full notice of its known properties (including the fact that it is an oxidizing agent) and that an explosion of the FGAN was not foreseeable if it was handled in accordance with established practices. We stand by these propositions here. Our contention, as stated earlier, is that the respondents are liable even though the explosion itself was not foreseeable. In suggesting that the United States is guilty of unbecoming inconsistency, the court below was misled by the same error that vitiates its analysis of the merits. It confused the principles which determine whether a defendant has been negligent toward the injured person with the principles which govern the extent of liability once actionable negligence is shown.

The only possible ground for accusing the United States of negligence was the contention that it should have foreseen and guarded against an explosion. Respondents were guilty of negligence in subjecting persons and property in the vicinity to the manifold risks of an uncontrollable fire. They became liable when the risk of damage to these persons and property eventuated even though they could not have foreseen the precise sequence of events.

2. The court below erred in deciding the case according to its view of Texas law. Federal maritime law is controlling. The Admiralty Extension Act of

1948 extends the jurisdiction of the admiralty courts to include any tort involving a negligent act committed on navigable waters which causes injury on land.[4] It clearly provides that the law to be applied to determine the rights and liabilities of the parties is that which would be applicable if all elements of the tort had occurred on navigable waters:

> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *.

Maritime law is therefore applicable to determine the liability of the respondents for negligence aboard the GRANDCAMP.[5]

Although the example given in the House Report involves a collision between a vessel and a bridge (H. Rep. No. 1523, 80th Cong., 2d Sess.), the situation is indistinguishable when a negligent fire or explosion on shipboard causes damage on land. Nor is it significant that the Admiralty Extension Act was passed in 1948, after the Texas City disaster. The

[4] Prior to passage of this statute, admiralty courts did not have jurisdiction over these so-called ambulatory torts. 1 Benedict, *Admiralty* (6th ed., 1940, Knauth), § 128. However, in a limitation of liability proceeding a court could entertain a non-maritime tort and apply substantive maritime law thereto. *Richardson* v. *Harmon*, 222 U.S. 96; *United States* v. *Norfolk-Berkley Bridge Corp.*, 29 F. 2d 115 (E.D. Va.).

[5] Since Texas would apply maritime law to a wrongful death action based upon a maritime tort, *Vassallo* v. *Nederl-Amerik Stoomv Maats Holland*, 344 S.W. 2d 421, the claims for wrongful death in this case should have been determined under maritime law.

Act applies retroactively to causes of action arising prior to its passage[6] except in suits in which the United States is a defendant.[7]

The Fifth Circuit's application of state law was not only a critical error in this highly important case; unless reviewed it will stand as a binding precedent upon a matter of continuing importance.

It is true that the government did not call attention to the Admiralty Extension Act in its original brief in the court of appeals. It principal arguments were addressed to matters of normal concern in a proceeding for exoneration or the limitation of liability—the negligence of the petitioners (*i.e.*, of the present respondents), the seaworthiness of the vessel, and the question of privity. The government's principal argument upon legal cause was that the question was not yet before the court because the validity of particular claims was not in issue. When an opinion was delivered showing that theories concerning the law of negligence and legal cause had been confused and made decisive, the government filed a petition for rehearing pointing out that the case was governed by federal maritime law. So plain an error should not go uncorrected in so important a case merely because the government failed to ap-

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[6] *United States* v. *Matson Nav. Co.*, 201 F. 2d 610 (C.A. 9); *All America Cables & Radio, Inc.* v. *The Dieppe*, 93 F. Supp. 923 (S.D. N.Y.)

[7] *Vega* v. *United States*, 86 F. Supp. 293 (S.D. N.Y.), affirmed, 191 F. 2d 921 (C.A. 2), certiorari denied, 343 U.S. 909.

preciate earlier the importance which the court's analysis would give to the question.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be granted.

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DECEMBER, 1961.

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* Even upon the assumption that Texas law governs, the fundamental confusion in the court's handling of basic principles in the law of torts remains. Texas follows and applies the basic principles set forth above, including the rule that when harm to the plaintiff is foreseeable, the defendant is not to be excused because the negligence became operative through an unforeseeable chain of events. *Biggers* v. *Continental Bus System, Inc.*, 157 Tex. 351, 303 S.W. 2d 359; *Sullivan* v. *Flores*, 134 Tex. 55, 132 S.W. 2d 110. Cf. *Chicago, Rock Island & Pacific R. Co.* v. *Goodson*, 242 F. 2d 203 (C.A. 5).

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18064

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE, Appellants,

versus

UNITED STATES OF AMERICA, ET. AL., Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(May 5, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON and JONES, Circuit Judges.

RIVES, Circuit Judge: The fire upon and explosion of the S.S. Grandcamp at Texas City, Texas, while she was loading a cargo of Fertilizer Grade Ammonium Nitrate (FGAN) on April 16, 1947, resulted in more than 500 deaths, more than 3000 personal injuries, and tremendous destruction of and damage to property. It has become known as the Texas City Disaster. On May 5, 1947, two weeks

after the disaster, the Republic of France, as owner, and Compagnie Generale Transatlantique (hereinafter referred to as the "French Line)", as agent of the owner or charterer of the vessel, filed a petition in the District Court for the Southern District of New York (Admiralty No. 149–248), pursuant to the Limitation of Liability Act, 46 U.S.C. Sections 182–189, praying for exoneration from or limitation of liability for damages resulting from the explosion. That New York limitation proceeding is still pending without trial or other disposition.

On October 17, 1947, within the six-month period prescribed by 46 U.S.C. § 185, the Republic of France and the French Line filed the present like petition for exoneration or limitation of liability in the District Court for the Southern District of Texas. A long delay in bringing the latter petition to trial has been occasioned by giving precedence to the suits under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2674, against the United States, the manufacturer of the FGAN. Eventually, this Court held that the United States was not liable, and its decision was affirmed by the Supreme Court: *In re Texas City Disaster Litigation*, 5 Cir., 1952, 197 F. 2d 771, affirmed *sub nom. Dalehite* v. *United States*, 1953, 346 U.S. 15.

Thereafter, in 1955 Congress enacted the Texas City Relief Act, 69 Stat. 707–709. That Act left insurance underwriters to bear their own losses, but provided for payment of uninsured claims in an amount not exceeding $25,000.00 for any one claim. Pursuant to the provisions of that statute, the United States paid approximately $16,000,000.00 to victims of the disaster and obtained from the recipients assignments of their claims for death, personal injuries and property damages which totalled approximately $70,000,000.00. Thereafter, in May 1957, the United States filed in

this proceeding an amended claim based upon these assignments, not for the $16,000,000.00 paid, but for approximately $70,000,000.00, the amount originally asserted by these claimants.

The claims of all persons who made assignments to the United States were dismissed on January 27, 1958. Many persons who had not made assignments to the United States thereafter voluntarily withdrew their claims. The only remaining claimant, other than the United States, is the Texas City Railway Terminal Co. That Company did not file under the Texas City Relief Act because it was not willing to assign an uninsured loss of nearly five million dollars for the $25,000.00 maximum allowed under the Relief Act. In addition to its assigned claims, the United States filed a claim in the amount of $350,000, as successor to the Reconstruction Finance Corporation, for the loss of goods in a warehouse awaiting loading on another vessel.

Neither of petitioners here was a party to the *Dalehite* case. The cases are alike to the extent that each arises out of the Texas City Disaster. Sensibly, the trial of the present case was shortened by the introduction by agreement of the testimony in *Dalehite* of 86 of the total of 133 witnesses in that case. Four of the witneses in *Dalehite* again testified in this case, and an additional 25 witnesses testified in open court during thirteen days of trial. So that the findings and decision of the district court in this case were based not only on a large part of the evidence taken in *Dalehite*, but also on a voluminous record now comprising some 2400 pages of additional testimony. The issues in the two cases, particularly at the present stage of this limitation proceeding, are not identical.

The findings of fact and conclusions of law of the district court in this case comprise some 43 pages of the printed record, and have been published at 171

F. Supp. 497 and at 1959 A.M.C. 547. Based upon such findings and conclusions, the district court entered an interlocutory decree granting the motion of the petitioners for leave to implead the United States,[1] and denying the petitions for exoneration or limitation.[2] This appeal is from that decree.

The only ultimate issue so far determined by the district court is that the petitioners are not entitled to exoneration from or limitation of liability. The merits of the claims or of the impleading petition have not yet been determined. The decree was captioned by the district court as an "Interlocutory Decree," and for purposes of appellate jurisdiction we think that it must be so considered. See *La Bourgogne*, 1907, 210 U.S. 95, 112, 113. The jurisdiction of this Court of Appeals is that granted by 28 U.S.C. § 1292(a)(3):

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> . . . . . .
>
> "(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty

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[1] In this connection, the district court's findings were made "without determining whether the United States may have been at fault in any particular in connection with the manufacture or shipping of the FGAN, or, if so, the effect thereof as to the various types of claims which the United States asserts, if there be such negligence it was not the sole cause of the disaster (as petitioners contend)."

[2] The operative parts of the interlocutory decree read:

"Ordered, that the motion of petitioners for leave to implead the United States of America pursuant to the 56th Rule in Admiralty of the United States Supreme Court is hereby granted and allowed; and it is further

"Ordered, Adjudged and Decreed, that said petition of the Republic of France and the Compagnie Generale Transatlantique for exoneration from and/or limitation of liability should be and hereby is denied as to each of said petitioners."

cases in which appeals from final decrees are allowed."

While interlocutory for purposes of appellate jurisdiction, this decree finally determined the rights and liabilities of the parties by denying the petition for exoneration from or limitation of liability. To that extent, the decree is not subject to the rule usually applicable to interlocutory decrees;[3] viz: that in reaching its final decree the court may exercise its discretion to re-examine any or all of its findings which form the basis of the interlocutory decree. Instead, except as to the issues which were reserved to be determined on the impleader of the United States (see footnote 1; *supra*), the present decree is res judicata on the issue of liability for the damages caused by the explosion.[4]

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[3] See Am. Jur., Judgments, Section 340; 50 C.J.S., Judgments, Section 650.

[4] British Transport Commission v. United States, 1957, 354 U.S. 129, 137, 142; affirming British Transport Commission v. United States, 4 Cir., 1956, 230 F. 2d 139, 144; Algoma, Central & Hudson Bay Ry. Co. v. Great L.T. Corp., 2d Cir., 1936, 86 F. 2d 708, 710; Gilmore & Black, The Law of Admiralty, pp. 733, 735; *cf.* Continental Grain Co. v. Barge FBL-585, 1960, 364 U.S. 19, 25.

That was substantially the position taken by Government counsel upon oral argument:

"JUDGE RIVES: Assuming that this interlocutory decree should be affirmed, where would you go from there? What would the government have to prove before it got a final decree?

MR. DAVIS: Well, assuming that the interlocutory decree is confirmed, your Honor, it goes back to the District Court for further proceedings.

JUDGE RIVES: What issues remain open? That's what I'm talking about.

MR. DAVIS. The questions of damages remain open, that is the principal one.

The district court found that the Grandcamp was unseaworthy in that she was improperly manned and

---

JUDGE RIVES: What issues as to liability remain open?
MR. DAVIS: What issues as to liability remain open? In respect of the petitioners' claim for exoneration and limitation of liability, that is the question that is up before this Court, and that question will be decided now.
JUDGE RIVES: What I am asking, before you get a judgment for your damages, have you still got to prove liability, and have they got to prove—
MR. DAVIS: Yes, I have to prove liability with respect to the various claims.
JUDGE RIVES: You have to prove your damages, of course?
MR. DAVIS: That is true, that is part of it.
JUDGE JONES: When you go back, are you going to have the burden of showing that somebody on that morning threw a cigarette in the hold and that started the fire?
MR. DAVIS: No, sir, I will not have any such burden, your Honor.
JUDGE CAMERON: You take the position, or you think the Court findings have settled that finally?
MR. DAVIS: As to the cause of the fire, yes, sir, I think the Court findings have settled that.

. . . . . .

JUDGE CAMERON: You are taking the position that the question of negligence cannot be litigated again, that the Court has already found negligence on the part of this Petitioner, and that is the law of the case?
MR. DAVIS: The question of negligence, insofar as the petitioner is concerned, your Honor, cannot be litigated again. As respects the question of negligence as far as the United States is concerned, they can litigate that.
JUDGE RIVES: They can litigate that it was the United States' fault and that they are in no position to recover; do you think that issue is still open?
MR. DAVIS: Certainly that issue is still open. In the final meeting of counsel before the Trial Judge we had no objection to his allowance of the in-pleading petition, we have no reserve about meeting that. We did not want to confuse things, and thought we should decide this question first and then we will decide that. Basically that goes to the amount of damages."

improperly stowed, and that the Grandcamp's unseaworthiness was within the privity and knowledge of the petitioners.[5] The district court found also that the master and the petitioners were guilty of fault and negligence both in the origin of the fire[6] and in the failure to extinguish it in its incipient stage.[7] The court concluded:

> "From the foregoing, it follows that by reason of the fault and negligence of the petitioners, and the unseaworthiness of the vessel, all of which was within the privity and knowledge of petitioners, neither is entitled to exoneration from or limitation of liability under § 183, Title 46 U.S.C.A."[8]

All of the claims having been filed, and there being no claims for loss of or damage to cargo, it is apparent that the fire statute, 46 U.S.C. § 182, is not applicable, and that consideration can be restricted to limitation of liability, 46 U.S.C. § 183. It is apparent also that there are no claims to which seaworthiness, not in itself amounting to negligence,[9] can apply.

The findings of fault and negligence which appellants challenge on this appeal are those pertaining to the cause of the fire, and to the procedures that should

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[5] See Findings numbered 40, 41, 42, 43 and 44 at 171 F. Supp. 509, 510.

[6] See particularly Findings 31 and 37–39, 171 F. Supp. 508, 509.

[7] See particularly Findings 33–36, 171 F. Supp. 509, and Findings 45–48, 171 F. Supp. 510, 511.

[8] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 512.

[9] See Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 542–549; Michalic v. Cleveland Tankers, Inc., 1960, 364 U.S. 325, 327–328.

have been used in attempting to extinguish the fire at its incipiency.[10]

We are relieved from entering into an exhaustive review of this voluminous record to reach a decision as to whether or not those findings of fact are clearly erroneous[11] by the following considerations. All of the claims for personal injury, death, and property damage resulted not directly from fire but from explosion. The district court found no more than that the Master could have foreseen the *possibility* of explosion.

> "The Master could and reasonably should have foreseen and anticipated the danger of a disastrous fire, with the *possibility* of explosion, in failing to prevent smoking in the presence or proximity of the FGAN. His negligence in this regard constituted a proximate cause of the fire, the resultant explosion, and the damages which ensued."
>
> "'In connection with this finding as to "foreseeability", it is undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry. What was not generally recognized before Texas City was (a) that ammonium nitrate would cause a detonation of such magnitude in the absence of great confinement and pressure (as within a bomb), and (b) that fire and heat alone would cause such detonation, without an initial or booster detonation; or, according to one theory, with such initial detonation resulting from an explosion of accumulated gases, which in turn

[10] The evidentiary basis for those findings is adequately disclosed in the full opinion of the district court. See 171 F. Supp. at pp. 505-511

[11] See McAllister v. United States, 1954, 348 U.S. 19; C.J. Dick Towing Co. v. The Leo, 5 Cir., 1953, 202 F. 2d 850, 853, 854.

come from the heated and decomposing ammonium nitrate.

"From the literature and information generally available, I do not believe that, in the exercise of ordinary care, the Master could have foreseen the probability of an explosion of *this sort*, even in the presence of fire. This finding should be interpreted in this light, and is based on the premises that, as he could foresee danger from fire from his negligent conduct, the 'foreseeability' test is met, and it is not necessary that he be able to foresee the *extent* of the damage which may ensue."[12]

In Texas, as elsewhere, not only proximate causal connection but also the very existence of a duty the breach of which will constitute actionable negligence depends upon reasonable foreseeability of consequences.[13]

The appellants urge as their "principal point" that, "even if unseaworthiness, fault and negligence be conceded, the district court, on the basis of its own findings, erred as a matter of law in holding that the claimed negligence which resulted in fire was the proximate cause of the injuries which resulted from the successive explosions, as its finding as to 'foreseeability' does not meet the standard of Texas law which was recognized by this Court in *Texas-New Mexico Railway Company v. Bailey*, 203 F. 2d 647 (1953)." The appellants emphasize that the district court found that the master could reasonably have foreseen only the *possibility* of explosion, and could not have foreseen "the probability of an explosion of

[12] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 508–509.

[13] Houston Light & Power Co. v. Brooks, Tex., 1960, 336 S.W. 2d 603; Prosser on Torts, 2d ed., pp. 258, 259.

this sort," and urge upon us our statement of the rule of liability in Texas, and the decisions upon which that statement is based:

> "In Texas the test of whether a negligent act or omission is a proximate cause of injury is whether 'the wrong-doer might by the exercise of ordinary care have foreseen that *some similar injury* might result from the negligence.' Atchison v. Texas & P. Ry. Co., 143 Tex. 466, 186 S.W. 2d 228, 232; St. Louis B. & M. Ry. Co. v. Brack, Tex. Civ. App., 102 S.W. 2d 261, 273." (Emphasis supplied.)

Texas-New Mexico Ry. Co. v. Bailey, 5 Cir., 1953, 203 F. 2d 647, 649–50.

In their reply brief, the appellants concede that the case of *Hopson v. Gulf Oil Corp.*, Tex., 1951, 237 S.W. 2d 352, 356, quoted in *Chicago, R.I. & P. Co., v. Goodson*, 5 Cir., 1957, 242 F. 2d 203, 207, correctly states the rule as follows:

> "It is sufficient that the defendant would reasonably have anticipated consequences or an injury of the general nature of that which ensued."

That rule is emphasized in the more recent opinion of *Biggers v. Continental Bus System*, Tex., 1957, 303 S.W. 2d 359, 364, 365, which disapproved a holding "that one's negligence cannot be a proximate cause of an injury unless the precise manner or means of the injury resulting from the negligence can be foreseen"; and, instead, held that:

> "The true rule is correctly stated in Sullivan v. Flores where it is said that all that is necessary to establish that an actor's negligent act is a proximate cause of an injury is proof that 'As a person of ordinary intelligence and prudence, he should have anticipated the

> danger to others created by his negligent act, and the rule does not require that he anticipate just how injuries will grow out of that dangerous situation.' [134 Tex. 55, 132 S.W. 2d 111.]"

The appellees argue with much force that the district court found that fault or negligence within the privity or knowledge of the owner or owners caused the fire and permitted it to increase in intensity, and that the fire caused the disastrous explosion. The appellees insist that that causal connection is sufficient within the holding of this Court in *Chicago, R.I. & P. R. Co. v. Goodson*, 1957, 242 F. 2d 203, 207:

> "As to the element of foreseeableness which is stressed as being an important element of probable cause in Texas jurisprudence, we think it correct to say that whatever directly results by the operation of natural laws from the unlawful channelling of water onto another's premises is a foreseeable event within the Texas rule."

The fallacy in that chain of argument is that it is only the operation of natural forces theretofore recognized as normal which one is charged with foreseeing.

> "*Meaning of 'normal.'* The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word 'normal' is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency."[14]
>
> "*Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions of nature or the operation of nat-

[14] 2 Restatement of Torts, pp. 816–817.

> ural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence." [15]

While in the present case there was some testimony in addition to the vast amount of evidence before the court in the Texas City Disaster Litigation, the district court still found it "undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry." The district court further found as to ammonium nitrate, which constituted approximately 95% of the FGAN, and which, with the benefit of hindsight, we now know to be the explosive part of the mixture:

> "18. Despite its use as a principal ingredient of high explosives, at the time of the disaster ammonium nitrate was not, and is not now, classified as an 'explosive' for transportation purposes by the Interstate Commerce Commission or the Coast Guard. This is true because it was considered that to cause the detonation of ammonium nitrate, an initial shock or 'booster' of considerable magnitude was required. The chances of such an initial or booster detonation being encountered in normal

[15] Id. at p. 818.

> conditions of transportation has always been considered so remote as to be negligible." [16]

Substantially all of the evidence is to the effect that the explosion, as distinguished from the fire, could not reasonably have been foreseen. In the opinions of the four judges of our Court constituting the majority in the earlier case, that was pretty clearly stated. Speaking for three of the judges, the writer had said:

> "In this case, it can hardly be argued that the dangers of explosion from FGAN were so well known prior to the disaster that judgment or discretion were not called into exercise as to whether it should be manufactured at all and under what safeguards and warnings it should be distributed. Even if some danger were recognized, the necessity of providing means of existence to the devastated areas might have called for the exercise of discretion as to whether to take a 'calculated risk'." [17]

Judge Strum expressed himself more positively:

> "This explosion was wholly unprecedented. Prior to this disaster, there had been no known instances of explosions during land transit, while in stowage awaiting export, in the many shiploads previously shipped overseas, nor in this FGAN while part of it was stacked at the Texas City Terminal awaiting loading." [18]

When the case reached the Supreme Court, Mr. Justice Reed, speaking for the Court, said:

> "'There must be knowledge of a danger, not merely possible, but probable,' *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E.

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[16] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 503.

[17] In re Texas City Disaster Litigation, 5 Cir. 1952, 197 F. 2d 771, 778.

[18] Id. at p. 782.

1050, 1053. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here." [19]

We agree with the view so aptly expressed in the appellants' brief:

> ". . . . It would be ironic indeed if the United States were permitted to impose liability for these claims on the Republic of France and the French Line in this litigation by claiming now that, unlike the officials and employees of the United States, the officials and employees of the French Government and the master of the Grandcamp should have known that FGAN was a dangerous explosive and that an explosion from fire should reasonably have been anticipated."

It results that the judgment must be reversed and the cause remanded with directions to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the explosion of the steamship Grandcamp.

REVERSED AND REMANDED WITH DIRECTIONS.

HUTCHESON, Circuit Judge, Dissenting:

I am unable to agree with the conclusion of the majority that the findings and conclusions of the district judge are clearly erroneous and his judgment must be reversed. A careful reading and re-reading of the district judge's findings and conclusions as a whole, as they are set out in his opinion, Petition of Republic of France, as Owner and of Compagnie Generale Transatlantique, as Agent, of THE Steamship GRANDCAMP, in a cause of Exoneration from and Limitation of Liability, No. 1870, 171 F. Supp.,

[19] Dalehite v. United States, 1953, 346 U.S. 15, 42.

497, leaves me with the clear conviction that the findings of fact are well supported by the record, and that the conclusions, that the petitioner is not entitled to limitation, or exoneration from liability, are well supported in law and in fact. I cannot, therefore, concur in the opinion of the majority which rejects the findings and reverses the judgment, but must dissent therefrom.

With deference, it seems to me that the majority opinion has gone astray as a direct result of the fact that two red herrings have been carefully and sedulously drawn by appellants across the trail of true fact and law which the district judge's opinion presents.

The first of these red herrings is undue emphasis on the decisions and opinions of this court and of the Supreme Court in the first Texas City disaster case, 197 F(2) 771, 346 U.S. 16. With deference those decisions and opinions have nothing to do with this case either as res judicata or as stare decisis. This case was tried on its own facts as a separate case by a different tribunal and judge and between different parties, and decision in it cannot be controlled or influenced by what occurred in those cases for two reasons: (1) the cases were tried on different facts by a different judge; and (2) the decisions in the appellate courts were based entirely on the view that the suit came within the discretionary provision of the Federal Tort Claims Act and, therefore, could not be maintained against the United States.

The majority, therefore, in my opinion, clearly errs in giving to the opinions in the Dalehite case the effect substantially of res judicata. This is so for two reasons. In the first place, this case was tried and must be determined upon its own evidence, upon which it was, in my opinion, entirely correct for the district judge to find fault and negligence as he did. In the

second place, the Dalehite case did not go off on the conclusion of no negligence but on the conclusion that the claim was excepted out of the Act by its discretionary provision.

The second red herring is the contention that damage of the kind occurring here was not, under Texas law, reasonably foreseeable. The contention invades the function and province of the district judge and in effect runs counter to the universally prevailing rule that the particular character of damage done does not have to be foreseen, but it is sufficient if the evidence shows that some damage could reasonably have been foreseen. It is clear to me that the majority opinion errs in giving to the Texas law on foreseeability, as an element of negligence and proximate cause, a meaning and effect different from that actually ascribed to it here and in other jurisdictions.

As the first and leading case in Texas on the question, *T & P Ry.* v. *Bigham*, 90 Texas at 227, shows, the rule applied in Texas is the same as that applied generally elsewhere There the Texas Supreme Court, quoting with approval from *Milwaukee Ry. Co. v. Kellogg*, 94 U.S. 409:

> "* * it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

then went on to say:

> "This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities. Upon the doctrine as abstractly stated there is a substantial consensus of opinion. That dif-

ficulties arise when we come to apply it to particular cases is not surprising when we reflect, that minds are prone to differ as to such questions; that the degree of probability rises by almost imperceptible gradations; and that the circumstances of such cases are so variant that hardly two can be found which present precisely the same state of fact. Under such circumstances it is hardly to be expected that many cases will not be found, the result of which seemingly do not accord with the doctrine as generally recognized.

"But we are not prepared to hold *that in no case can the original cause of the injury be deemed the proximate cause, where an independent and disconnected agency has supervened and brought about the result. The fact of the intervention of an independent agency, it occurs to us, bears more directly upon the question whether the injury ought, under all the circumstances, to have been foreseen;* and, where this latter fact appears, we think that the original negligent act ought to be deemed actionable. In Seale v. Railway Co., 65 Texas. 274, Chief Justice Willie says: *'If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken.'* It follows, that in our opinion, the question of probable cause ought to depend upon the further question, whether a reasonably prudent man, in view of all the facts, would have anticipated the result—not necessarily *the precise actual injury, but some like injury, produced by similar intervening agencies.*" (Emphasis supplied.)

This court, in *Chicago, R.I. & Pac. Ry. Co. v. Goodson*, 242 F(2) 203, by Rives, Tuttle and Jones, with Judge Tuttle the organ of the court, accurately dis-

cussed and stated, and correctly applied the Texas doctrine of foreseeability.

It seems clear to me that in this maritime case the district judge correctly understood the principle obtaining and correctly applied it to find liability here. I would affirm the interlocutory decree both on limitation and exoneration of liability, without prejudice, however, to the right of the petitioner, in defense of particular claims for damages, to offer such further evidence in each case bearing on the question of foreseeability as it may desire to offer.

It seems clear to me, also, that the majority has given too much and a wrong effect to the statement of the district judge, in note 3 in his opinion, where, after having stated in the body of the opinion that the master could and should have foreseen the danger of a disastrous fire, said in the note to his opinion at that point that the master could not have foreseen the explosion that occurred. With deference, to the contrary view of the majority, it seems clear to me that the district judge was distinguishing between *what the master, as a natural man and individual, actually knew as distinguished from what, as a representative of the ship and owner, he was required in law and ought to know.* A reading of the opinion as a whole, in which the district judge points out fully his reasons for denying the limitation, shows, I think, in the clearest way that the district judge, in the note, was making this distinction and was not contradicting his finding in the body of the opinion, that the master was charged with the knowledge and ought to have known and foreseen an explosion as a consequence of the situation which was then and there obtaining.

I respectfully dissent.

JUDGMENT

EXTRACT FROM THE MINUTES OF MAY 5, 1961

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE,

v.

UNITED STATES OF AMERICA, ET AL.

No. 18064.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the steamship Grandcamp.

Hutcheson, Circuit Judge, Dissenting.

NO. 18,064

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE, Appellants,

v.

UNITED STATES OF AMERICA, ET AL., Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(July 11, 1961)

ON PETITIONS FOR REHEARING

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON and JONES, Circuit Judges.

PER CURIAM:

The petitions for rehearing in the above-styled and numbered cause are hereby

DENIED.

JUDGE HUTCHESON DISSENTS.

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NO. 595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

TEXAS CITY TERMINAL RAILWAY COMPANY,
Petitioner

v.

REPUBLIC OF FRANCE AND COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondents

PETITION OF TEXAS CITY TERMINAL RAILWAY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO._____

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v.

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Respondents

PETITION OF TEXAS CITY TERMINAL RAILWAY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 5, 1961 (R. 2672), reversing an interlocutory judgment in Admiralty of the District Court of the United States for the Southern District of Texas in favor of Petitioner and the United States of America (R. 452) and ordering a final judgment rendered for the Respondents.

This petition in substance presents the same questions as presented by the petition of the United States of

America, in No. 594, *United States of America, Petitioner, v. Republic of France* and *Compagnie Generale Transatlantique*, filed in this Court on December 8, 1961. Petitioner and the United States were both equally, or jointly, successful in the Trial Court; both were Appellees in the Court of Appeals and both are Petitioners for certiorari from the judgment of that Court. A decision by this Court in favor of the United States to the same extent would be a decision in favor of this Petitioner. However, as we stated in both the Trial Court and the Court of Appeals, the United States is by far the larger claimant and has at all times taken the lead and actively presented the case in behalf of itself and all claimants including Petitioner. The role of Petitioner in both Courts below, while identical with that of the United States in the result sought to be obtained, has been secondary and subordinate to that of the United States and we have followed along with the United States.

The certified record has been heretofore filed in Cause No. 594 and all record references here are to that record. There was only one single record below.

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 418) printed in Appendix A hereto, infra Page 28, are reported in 171 F. Supp. 497. The opinion of the Court of Appeals (R. 2652) printed in Appendix A hereto, infra Page 9, is reported in 290 Fed. 2d 395.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1961 (R. 2672 and infra Page 56). Petitioner

Texas City Terminal Railway Company filed a Petition for Rehearing on May 24, 1961 (R. 2673) which was overruled on July 11, 1961 (R. 2727). By order entered October 9, 1961, Mr. Justice Black extended Petitioner's time for filing petition for a Writ of Certiorari to and including December 8, 1961.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 642, 52 Stat. 928, 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED[1]

(1) In a suit peculiarly maritime in nature, i.e., an admiralty proceeding for exoneration and/or limitation of liability, does the general maritime law of causation control, or is causation limited by local Texas law?

(2) The Trial Court having found Respondents guilty of many acts of negligence and fault[2] and that these acts were in fact the cause of the explosion aboard the SS

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1 If this petition is granted, Petitioner would also urge for decision all questions presented by the United States in Cause No. 394.

2 (a) Negligently permitting smoking which started the fire in the hold of the GRANDCAMP (Findings 28-32, R. 136-140); (b) failing to use water in fighting the fire (Findings 33-36, R. 141-145); (c) the acceptance of broken bags of the cargo in violation of Coast Guard regulations (Findings 37-39); (d) GRANDCAMP was improperly manned in that her Captain was unaware of the nature and dangerous propensities of cargo and how to combat its dangers (Finding 40); (e) failure of Respondent Republic of France to comply with Coast Guard regulations requiring it as shipper of dangerous cargo to furnish information with respect thereto to the vessel (Findings 41 and 46); (f) failure of Respondent Compagnie Generale Transatlantique to know the nature and character of the cargo and to inform the Master thereof (Findings 42, 46 and 47); (g) the dangerous and improper loading of the GRANDCAMP by reason of the presence in Hold No. 1 of a number of Broken bags, a condition forbidden by Coast Guard regulations (Finding 43).

GRANDCAMP, have the causation requirements of maritime law been met?

(3) The Trial Court having found that the Respondent Republic of France was guilty of statutory fault[3] and that this was in fact a cause of the explosion aboard the SS GRANDCAMP, have the causation requirements of maritime law been met?

(4) Assuming Texas law to be applicable, did the majority of the Court of Appeals correctly apply it here?

STATEMENT

Respondents, Republic of France and Compagnie Generale Transatlantique (French Line), brought suit in the United States District Court for the Southern District of Texas in Admiralty for exoneration and/or limitation of liability for their acts in connection with the Texas City Disaster (R. 67). When Respondents' petition came on for hearing, the two protesting claimants were the United States of America (R. 188) and Texas City Terminal Railway Company (R. 124). The Trial Court refused the petition in exoneration and/or limitation (R. 452) and the Republic of France and Compagnie Generale Transatlantique appealed, (R. 460). In so refusing to either exonerate Respondents or limit their liability, the Trial Court found that Respondents knew or should have known that ammonium nitrate was an oxidizing agent (Finding 24, R. 432); that the fertilizer loaded aboard the GRANDCAMP (referred to in this litigation as FGAN) was essentially ammonium nitrate (Finding 25); that the fire aboard the GRANDCAMP resulted from longshoremen's

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[3] Failure, as shipper to comply with Coast Guard regulations 146.05-13 (issued pursuant to and under 46 U.S.C. Sec. 170) directing that a shipper of a dangerous cargo furnish information with respect thereto to the vessel (Findings 11 and 45 and Conclusion of Law No. 5).

smoking (Findings 29 and 30); that the failure of the Master of the vessel to enforce no smoking regulations constituted fault and negligence and had a direct and causal connection with the ensuing fire and explosion (Findings 28 and 31); that the Master could have reasonably foreseen and anticipated the danger of a disastrous fire "with the possibility of explosion, in failing to prevent smoking in the presence or proximity of the FGAN", and that this negligence constituted a proximate cause of the fire, explosion and damages (Finding 32); that the Captain of the vessel was negligent in the manner in which he fought the fire in the FGAN and that this constituted a proximate cause of the disaster and the ensuing damages (Findings 33-36); that the Master of the vessel was guilty of negligence in accepting broken bags aboard the ship in violation of Coast Guard regulations and that this was a contributing cause of the disaster (Findings 37-39); that the GRANDCAMP was unseaworthy because the Captain was unaware of the nature of the cargo or how to guard against or combat its dangers (Finding 40); that the Respondent Republic of France was negligent in that through the French Supply Council, as shipper, it failed to comply with Coast Guard regulations directing the shipper of a dangerous cargo to furnish information with respect thereto, to the vessel or her agent (Finding 41); that the Respondent, the French Line, was negligent in failing to learn the nature and character of the cargo accepted and in failing to inform the Master fully in connection therewith (Finding 42); that the SS GRANDCAMP was unseaworthy in that she was dangerously and improperly loaded (in violation of Coast Guard regulations) by reason of the presence of the broken bags of a dangerous cargo in her hold (Finding 43); that the Respondent Republic of France through the French Supply Council, as

shipper, while possessed of the actual knowledge of the characteristics of the cargo, failed to furnish to the ship's agent or Master a written order informing them of the characteristics of the cargo as required by Coast Guard regulations (Finding 45) and that such failures constituted negligence and were a proximate and contributing cause of the disaster and the ensuing damages (Findings 46 and 47).

After making the above findings of negligence, the Trial Court further found that Respondents were liable for the fire, ensuing explosion and the damages caused by the explosion.

On appeal, a majority of Court of Appeals reversed, holding that the Texas law as to foreseeability in connection with proximate cause was applicable and, under the findings of the District Court, had not been satisfied. The Court of Appeals assumed the correctness of the District Court's findings of fact as to fault and negligence but held that, as a matter of law, under the findings of the Trial Court, the foreseeability requirements of Texas law (as a part of the question of causation) had not been met and then held no liability existed for the results of the explosion. Judge Hutcheson dissented expressing the view that under Texas law and Admiralty law causation had been established by the Trial Court's findings.

REASONS FOR GRANTING THE WRIT

1.

The decision of the Court below holds that in proceedings which are peculiarly in Admiralty, i.e., a petition for exoneration and/or limitation, the law of the State in which the accident occurred shall be applicable. Whether it is general maritime law or the law of the State which

determines liability in this cause is of tremendous importance to the whole application of maritime law in general. By its separate petition in Cause No. 594, the United States has argued fully this question and we do not believe that further argument would be of particular benefit to the Court now.

2.

Additional reasons for granting this writ have been fully stated in the Government's petition for certiorari in Cause No. 594, and we believe, if repeated here, would not be of any material assistance to the Court and we, therefore, refrain from re-stating them here but simply call the Court's attention to the petition for certiorari heretofore filed by the United States in Cause No. 594.

CONCLUSION

The issues presented here involve questions of law of such importance to the future administration and application of Admiralty law that they should be settled by this Court. For all the foregoing reasons, it is accordingly urged and prayed that a writ of certiorari to review the judgment of the Court below be granted.

Respectfully submitted,

McLeod, Mills, Shirley & Alexander
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Galveston, Texas
Attorneys for Petitioner, Texas City Terminal Railway Company

CERTIFICATE

I hereby certify that I have served a copy of this Petition for a Writ of Certiorari on:

Eastham, Dale & Forney
Mellie Esperson Building
Houston, Texas

Hill, Betts, Yamaoka, Freehill & Longcope
26 Broadway
New York 4, New York
Attorneys for Respondents, Republic of France and Compagnie Generale Transatlantique

The Solicitor General
Department of Justice
Washington, D. C.

Mr. Alan S. Rosenthal, Attorney
Department of Justice
Washington, D. C.

Mr. Carl C. Davis, Attorney
Department of Justice
Washington, D. C.
Attorneys for the United States of America

the 8 day of December, 1961, by depositing the same in regular United States registered mail, first class, properly addressed and postage attached.

Preston Shirley

PRESTON SHIRLEY

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18064

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE,

Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(May 5, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON and JONES, Circuit Judges.

RIVES, Circuit Judge: The fire upon and explosion of the S.S. Grandcamp at Texas City, Texas while she was loading a cargo of Fertilizer Grade Ammonium Nitrate

(FGAN) on April 16, 1947, resulted in more than 500 deaths, more than 3000 personal injuries, and tremendous destruction of and damage to property. It has become known as the Texas City Disaster. On May 5, 1947, two weeks after the disaster, the Republic of France, as owner, and Compagnie Generale Transatlantique (hereinafter referred to as the "French Line)", as agent of the owner or charterer of the vessel, filed a petition in the District Court for the Southern District of New York (Admiralty No. 149-248), pursuant to the Limitation of Liability Act, 46 U.S.C. Sections 182-189, praying for exoneration from or limitation of liability for damages resulting from the explosion. That New York Limitation proceeding is still pending without trial or other disposition.

On October 17, 1947, within the six-month period prescribed by 46 U.S.C. §185, the Republic of France and the French Line filed the present like petition for exoneration or limitation of liability in the District Court for the Southern District of Texas. A long delay in bringing the latter petition to trial has been occasioned by giving precedence to the suits under the Federal Tort Claims Act, 28 U.S.C. §§1346 and 2674, against the United States, the manufacturer of the FGAN. Eventually, this Court held that the United States was not liable, and its decision was affirmed by the Supreme Court. *In re Texas City Disaster Litigation*, 5 Cir., 1952, 197 F. 2d 771, affirmed *sub nom. Dalehite v. United States*, 1953, 346 U.S. 15.

Thereafter, in 1955 Congress enacted the Texas City Relief Act, 69 Stat. 707-709. That act left insurance underwriters to bear their own losses, but provided for payment of uninsured claims in an amount not exceeding $25,000.00 for any one claim. Pursuant to the provisions of that statute, the United States paid approxi-

mately $16,000,000.00 to victims of the disaster and obtained from the recipients assignments of their claims for death, personal injuries and property damages which totalled approximately $70,000,000.00. Thereafter, in May 1957, the United States filed in this proceeding an amended claim based upon these assignments, not for the $16,000,000.00 paid, but for approximately $70,000,000.00, the amount originally asserted by these claimants.

The claims of all persons who made assignments to the United States were dismissed on January 27, 1958. Many persons who had not made assignments to the United States thereafter voluntarily withdrew their claims. The only remaining claimant, other than the United States, is the Texas City Railway Terminal Co. That Company did not file under the Texas City relief Act because it was not willing to assign an uninsured loss of nearly five million dollars for the $25,000.00 maximum allowed under the Relief Act. In addition to its assigned claims, the United States filed a claim in the amount of $350,000, as successor to the Reconstruction Finance Corporation, for the loss of goods in a warehouse awaiting loading on another vessel.

Neither of petitioners here was a party to the *Dalehite* case. The cases are alike to the extent that each arises out of the Texas City Disaster. Sensibly, the trial of the present case was shortened by the introduction by agreement of the testimony in *Dalehite of 86* of the total of 133 witnesses in that case. Four of the witnesses in *Dalehite* again testified in this case, and an additional 25 witnesses testified in open court during thirteen days of trial. So that the findings and decision of the district court in this case were based not only on a large part of the evidence taken in *Dalehite*, but also on a voluminous record

now comprising some 2400 pages of additional testimony. The issues in the two cases, particularly at the present stage of this limitation proceeding, are not identical.

The findings of fact and conclusions of law of the district court in this case comprise some 43 pages of the printed record, and have been published at 171 F. Supp. 497 and at 1959 A.M.C. 547. Based upon such findings and conclusions, the district court entered an interlocutory decree granting the motion of the petitioners for leave to implead the United States,[1] and denying the petitions for exoneration or limitation.[2] This appeal is from that decree.

The only ultimate issue so far determined by the district court is that the petitioners are not entitled to exoneration from or limitation of liability. The merits of the claims or of the impleading petition have not yet been determined. The decree was captioned by the district court as an "Interlocutory Decree," and for purposes of appellate jurisdiction we think that it must be so considered. See *La Bourgogne*, 1907, 210 U.S. 95, 112, 113. The jurisdiction of this Court of Appeals is that granted by 28 U.S.C. §1292 (a)(3):

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1 In this connection, the district court's findings were made "without determining whether the United States may have been at fault in any particular in connection with the manufacture or shipping of the FGAN, or, if so, the effect thereof as to the various types of claims which the United States asserts, if there be such negligence it was not the sole cause of the disaster (as petitioners contend)."

2 The operative parts of the interlocutory decree read:

"Ordered, that the motion of petitioners for leave to implead the United States of America pursuant to the 56th Rule in Admiralty of the United States Supreme Court is hereby granted and allowed; and it is further

"Ordered, Adjudged and Decreed, that said petition of the Republic of France and the Compagnie Generale Transatlantique for exoneration from and/or limitation of liability should be and hereby is denied as to each of said petitioners."

"(a) The courts of appeals shall have jurisdiction of appeals from:

. . . . . .

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

While interlocutory for purposes of appellate jurisdiction, this decree finally determined the rights and liabilities of the parties by denying the petition for exoneration from or limitation of liability. To that extent, the decree is not subject to the rule usually applicable to interlocutory decrees;[3] viz: that in reaching its final decree the court may exercise its discretion to re-examine any or all of its findings which form the basis of the interlocutory decree. Instead, except as to the issues which were reserved to be determined on the impleader of the United States (see footnote †, *supra*), the present decree is res judicata on the issue of liability for the damages caused by the explosion.[4]

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[3] See 30 Am. Jur., Judgments, Section 310; 50 C.J.S., Judgments, Section 650.

[4] British Transport Commission v. United States, 1957, 354 U.S. 129, 147, 112; affirming British Transport Commission v. United States, 1 Cir., 1956, 229 F. 2d 139, 141; Algoma, Central & Hudson Bay Ry. Co. v. Great L.T. Corp., 2d Cir., 1956, 86 F. 2d 708, 710; Gilmore & Black, The Law of Admiralty, 1957, 733, 735; cf. Continental Grain Co. v. Barge FBL-585, 1960, 364 U.S. 19, 25.

That was substantially the position taken by Government counsel upon oral argument:

"JUDGE RIVES: Assuming that this interlocutory decree should be affirmed, where would you go from there? What would the government have to prove before it got a final decree?

MR. DAVIS: Well, assuming that the interlocutory decree

The district court found that the Grandcamp was unseaworthy in that she was improperly manned and improperly stowed, and that the Grandcamp's unseaworthiness was within the privity and knowledge of the peti-

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is confirmed, your Honor, it goes back to the District Court for further proceedings.

JUDGE RIVES: What issues remain open? That's what I'm talking about.

MR. DAVIS: The questions of damages remain open, that is the principal one.

JUDGE RIVES: What issues as to liability remain open?

MR. DAVIS: What issues as to liability remain open? In respect of the petitioners' claim for exoneration and limitation of liability, that is the question that is up before this Court, and that question will be decided now.

JUDGE RIVES: What I am asking, before you get a judgment for your damages, have you still got to prove liability, and have they got to prove—

MR. DAVIS: Yes, I have to prove liability with respect to the various claims.

JUDGE RIVES: You have to prove your damages, of course.

MR. DAVIS: That is true, that is part of it.

JUDGE JONES: When you go back, are you going to have the burden of showing that somebody on that morning threw a cigarette in the hold and that started the fire?

MR. DAVIS: No, sir, I will not have any such burden, your Honor.

JUDGE CAMERON: You take the position, or you think the Court findings have settled that finally?

MR. DAVIS: As to the cause of the fire, yes, sir, I think the Court findings have settled that.

JUDGE CAMERON: You are taking the position that the question of negligence cannot be litigated again, that the Court has already found negligence on the part of this Petitioner, and that is the law of the case?

MR. DAVIS: The question of negligence, insofar as the petitioner is concerned, your Honor, cannot be litigated again. As respects the question of negligence as far as the United States is concerned, they can litigate that.

JUDGE RIVES: They can litigate that it was the United States' fault and that they are in no position to recover; do you think that issue is still open?

tioners.[5] The district court found also that the master and the petitioners were guilty of fault and negligence both in the origin of the fire[6] and in the failure to extinguish it in its incipient stage.[7] The court concluded:

> "From the foregoing, it follows that by reason of the fault and negligence of the petitioners, and the unseaworthiness of the vessel, all of which was within the privity and knowledge of petitioners, neither is entitled to exoneration from or limitation of liability under §183, Title 46 U.S.C.A."[8]

All of the claims having been filed, and there being no claims for loss of or damage to cargo, it is apparent that the fire statute, 46 U.S.C. §182, is not applicable, and that consideration can be restricted to limitation of liability, 46 U.S.C. §183. It is apparent also that there are no claims to which seaworthiness, not in itself amounting to negligence,[9] can apply.

MR. DAVIS: Certainly that issue is still open. In the final meeting of counsel before the Trial Judge we had no objection to his allowance of the in-pleading petition, we have no reserve about meeting that. We did not want to confuse things, and thought we should decide this question first and then we will decide that. Basically that goes to the amount of damages."

[5] See Findings numbered 10, 11, 42, 43 and 44 at 171 F. Supp. 509, 510.

[6] See particularly Findings 31 and 37-39, 171 F. Supp. 508, 509.

[7] See particularly Findings 33-36, 171 F. Supp. 509, and Findings 45-48, 171 F. Supp. 510, 511.

[8] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 512.

[9] See Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 542-549; Michalic v. Cleveland Tankers, Inc., 1960, 364 U.S. 325, 327-328.

The findings of fault and negligence which appellants challenge on this appeal are those pertaining to the cause of the fire, and to the procedures that should have been used in attempting to extinguish the fire at its incipiency.[10]

We are relieved from entering into an exhaustive review of this voluminous record to reach a decision as to whether or not those findings of fact are clearly erroneous[11] by the following considerations. All of the claims for personal injury, death, and property damage resulted not directly from fire but from explosion. The district court found no more than that the Master could have foreseen the *possibility* of explosion:

> "The Master could and reasonably should have foreseen and anticipated the danger of a disastrous fire, with the *possibility* of explosion, in failing to prevent smoking in the presence or proximity of the FGAN. His negligence in this regard constituted a proximate cause of the fire, the resultant explosion, and the damages which ensued.[8]
>
> "[8] In connection with this finding as to 'foreseeability', it is undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry What was not generally recognized before Texas City was (a) that ammonium nitrate would cause a detonation of such magnitude in the absence of great confinement and pressure (as within a bomb), and (b) that fire and heat alone would

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10. The evidentiary basis for those findings is adequately disclosed in the full opinion of the district court. See 171 F. Supp. at pp. 505-511.

11. See McAllister v. United States, 1954, 348 U.S. 19; C.J. Dick Towing Co. v. The Leo, 5 Cir., 1953, 202 F.2d 850, 853, 854.

> cause such detonation, without an initial or booster detonation; or, according to one theory, with such initial detonation resulting from an explosion of accumulated gases, which in turn come from the heated and decomposing ammonium nitrate.
>
> "From the literature and information generally available, I do not believe that, in the exercise of ordinary care, the Master could have foreseen the probability of an explosion of *this sort*, even in the presence of fire. This finding should be interpreted in this light, and is based on the premises that, as he could foresee danger from fire from his negligent conduct, the 'foreseeability' test is met, and it is not necessary that he be able to foresee the *extent* of the damage which may ensue."[12]

In Texas, as elsewhere, not only proximate causal connection but also the very existence of a duty the breach of which will constitute actionable negligence depends upon reasonable foreseeability of consequences.[13]

The appellants urge as their "principal point" that, "even if unseaworthiness, fault and negligence be conceded, the district court, on the basis of its own findings, erred as a matter of law in holding that the claimed negligence which resulted in fire was the proximate cause of the injuries which resulted from the successive explosions, as its findings as to 'foreseeability' does not meet the standard of Texas law which was recognized by this Court in *Texas-New Mexico Railway Company v. Bailey*, 203 F. 2d 647 (1953)." The appellants emphasize that the district court found that the master could reasonably

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12 Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 508-509.

13 Houston Light & Power Co. v. Brooks, Tex. 1960, 330 S.W. 2d 603; Prosser on Torts, 2d ed., pp. 258, 259.

have foreseen only the *possibility* of explosion and could not have foreseen "the probability of an explosion of this sort," and urge upon us our statement of the rule of liability in Texas, and the decisions upon which that statement is based:

> "In Texas the test of whether a negligent act or omission is a proximate cause of injury is whether 'the wrong-doer might by the exercise of ordinary care have foreseen that *some similar injury* might result from the negligence. Atchison v. Texas & P. Ry. Co., 143 Tex. 466, 186 S.W. 2d 228, 232; St. Louis B.&M. Ry. Co. v. Brack, Tex.Civ.App., 102 S.W. 2d 261, 273." (Emphasis supplied.)

Texas-New Mexico Ry. Co. v. Bailey, 5 Cir., 1953, 203 F. 2d 647, 649-50.

In their reply brief, the appellants concede that the case of *Hopson v. Gulf Oil Corp.*, Tex., 1951, 237 S.W. 2d 352, 356, quoted in *Chicago, R. I. & P. Co. v. Goodson*, 5 Cir., 1957, 242 F. 2d 203, 207, correctly states the rule as follows:

> "It is sufficient that the defendant would reasonably have anticipated consequences or an injury of the general nature of that which ensued."

That rule is emphasized in the more recent opinion of *Biggers v. Continental Bus System*, Tex., 1957, 303 S.W. 2d 359, 364, 365, which disapproved a holding "that one's negligence cannot be a proximate cause of an injury unless the precise manner or means of the injury

resulting from the negligence can be foreseen"; and, instead, held that:

> "The true rule is correctly stated in Sullivan v. Flores where it is said that all that is necessary to establish that an actor's negligent act is a proximate cause of an injury is proof that 'As a person of ordinary intelligence and prudence, he should have anticipated the danger to others created by his negligent act, and the rule does not require that he anticipate just how injuries will grow out of that dangerous situation.' [134 Tex. 55, 132 S.W. 2d 111.]"

The appellees argue with much force that the district court found that fault or negligence within the privity or knowledge of the owner or owners caused the fire and permitted it to increase in intensity, and that the fire caused the disastrous explosion. The appellees insist that that causal connection is sufficient within the holding of this Court in *Chicago, R.I. & P. R. Co. v. Goodson*, 1957, 242 F. 2d 203, 207:

> "As to the element of foreseeableness which is stressed as being an important element of probable cause in Texas jurisprudence, we think it correct to say that whatever directly results by the operation of natural laws from the unlawful channelling of water onto another's premises is a foreseeable event within the Texas rule."

The fallacy in that chain of argument is that it is only the operation of natural forces theretofore recognized as normal which one is charged with foreseeing.

"*Meaning of 'normal.'* The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word 'normal' is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of fequency."[14]

"*Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence."[15]

While in the present case there was some testimony in addition to the vast amount of evidence before the court in the Texas City Disaster Litigation, the district court still found it "undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry." The district court further found as to ammonium nitrate, which constituted approximately 95% of the FGAN, and

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[14] 2 Restatement of Torts, pp. 816-817.

[15] Id. at p. 818.

which, with the benefit of hindsight, we now know to be the explosive part of the mixture:

> "18. Despite its use as a principal ingredient of high explosives, at the time of the disaster ammonium nitrate was not, and is not now, classified as an 'explosive' for transportation purposes by the Interstate Commerce Commission or the Coast Guard. This is true because it was considered that to cause the detonation of ammonium nitrate, an initial shock or 'booster' of considerable magnitude was required. The chances of such an initial or booster detonation being encountered in normal conditions of transportation has always been considered so remote as to be negligible."[16]

Substantially all of the evidence is to the effect that the explosion, as distinguished from the fire, could not reasonably have been foreseen. In the opinions of the four judges of our Court constituting the majority in the earlier case, that was pretty clearly stated. Speaking for three of the judges, the writer had said:

> "In this case, it can hardly be argued that the dangers of explosion from FGAN were so well known prior to the disaster that judgment or discretion were not called into exercise as to whether it should be manufactured at all and under what safeguards and warnings it should be distributed. Even if some danger were recognized, the necessity of providing means of existence to the devastated areas might have called for

[16] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 503.

the exercise of discretion as to whether to take a 'calculated risk'."[17]

Judge Strum expressed himself more positively:

> "This explosion was wholly unprecedented. Prior to this disaster, there had been no known instances of explosions during land transit, while in stowage awaiting export, in the many shiploads previously shipped overseas, nor in this FGAN while part of it was stacked at the Texas City Terminal awaiting loading."[18]

When the case reached the Supreme Court, Mr. Justice Reed, speaking for the Court, said:

> "'There must be knowledge of a danger, not merely possible, but probable,' *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here."[19]

We agree with the view so aptly expressed in the appellants' brief:

> ". . . It would be ironic indeed if the United States were permitted to impose liability for these claims on the Republic of France and the French Line in this litigation by claiming now that, un-

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17 In re Texas City Disaster Litigation, 5 Cir., 1952, 197 F. 2d 771, 778.

18 Id. at p. 782.

19 Dalehite v. United States, 1953, 346 U.S. 15, 42.

like the officials and employees of the United States, the officials and employees of the French Government and the master of the Grandcamp should have known that FGAN was a dangerous explosive and that an explosion from fire should reasonably have been anticipated."

It results that the judgment must be reversed and the cause remanded with directions to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the explosion of the steamship Grandcamp.

REVERSED AND REMANDED WITH DIRECTIONS. HUTCHESON, Circuit Judge, Disenting:

I am unable to agree with the conclusion of the majority that the findings and conclusions of the district judge are clearly erroneous and his judgment must be reversed. A careful reading and re-reading of the district judge's findings and conclusions as a whole, as they are set out in his opinion, Petition of Republic of France, as Owner and of Compagnie Generale Transatlantique, as Agent, of THE Steamship GRANDCAMP, in a cause of Exoneration from and Limitation of Liability, No. 1870, 171 F. Supp., 497, leaves me with the clear conviction that the findings of fact are well supported by the record, and that the conclusions, that the petitioner is not entitled to limitation, or exoneration from liability, are well supported in law and in fact. I cannot, therefore, concur in the opinion of the majority which rejects the findings and reverses the judgment, but must dissent therefrom.

With deference, it seems to me that the majority opinion has gone astray as a direct result of the fact that two red herrings have been carefully and sedulously drawn by appellants across the trail of true fact and law which the district judge's opinion presents.

The first of these red herrings is undue emphasis on the decisions and opinions of this court and of the Supreme Court in the first Texas City disaster case, 197 F. 2d 771, 346 U.S. 16. With deference those decisions and opinions have nothing to do with this case either as res judicata or as stare decisis. This case was tried on its own facts as a separate case by a different tribunal and judge and between different parties, and decision in it cannot be controlled or influenced by what occurred in those cases for two reasons: (1) the cases were tried on different facts by a different judge; and (2) the decisions in the appellate courts were based entirely on the view that the suit came within the discretionary provision of the Federal Tort Claims Act and, therefore, could not be maintained against the United States.

The majority, therefore, in my opinion, clearly errs in giving to the opinions in the *Dalehite* case the effect substantially of res judicata. This is so for two reasons. In the first place, this case was tried and must be determined upon its own evidence, upon which it was, in my opinion, entirely correct for the district judge to find fault and negligence as he did. In the second place, the *Dalehite* case did not go off on the conclusion of no negligence but on the conclusion that the claim was excepted out of the Act by its discretionary provision.

The second red herring is the contention that damage of the kind occurring here was not, under Texas law, reasonably foreseeable. The contention invades the function and province of the district judge and in effect runs counter to the universally prevailing rule that the particular character of damage done does not have to be foreseen, but it is sufficient if the evidence shows that some damage could reasonably have been foreseen. It is

clear to me that the majority opinion errs in giving to the Texas law on foreseeability, as an element of negligence and proximate cause, a meaning and effect different from that actually ascribed to it here and in other jurisdictions.

As the first and leading case in Texas on the question, *T & P Ry. v. Bigham*, 90 Texas at 227, shows, the rule applied in Texas is the same as that applied generally elsewhere. There the Texas Supreme Court, quoting with approval from *Milwaukee Ry. Co. v. Kellogg*, 94 U.S. 409:

> "* * * it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

then went on to say:

> "This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities. Upon the doctrine as abstractly stated there is a substantial consensus of opinion. That difficulties arise when we come to apply it to particular cases is not surprising when we reflect, that minds are prone to differ as to such questions; that the degree of probability rises by almost imperceptible gradations; and that the circumstances of such cases are so variant that hardly two can be found which present precisely the same state of fact. Under such circumstances it is hardly to be expected that many cases will not be found, the

result of which seemingly do not accord with the doctrine as generally recognized.

"But we are not prepared to hold *that in no case can the original cause of the injury be deemed the proximate cause, where an independent and disconnected agency has supervened and brought about the result. The fact of the intervention of an independent agency, it occurs to us, bears more directly upon the question whether the injury ought, under all the circumstances, to have been foreseen;* and, where this latter fact appears, we think that the original negligent act ought to be deemed actionable. In Seale v. Railway Co., 65 Texas, 274, Chief Justice Willie says: *'If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken.'* It follows, that in our opinion, the question of probable cause ought to depend upon the further question, whether a reasonably prudent man, in view of all the facts, would have anticipated the result—not necessarily *the precise actual injury, but some like injury, produced by similar intervening agencies.*" (Emphasis supplied.)

This court, in *Chicago, R.I. & Pac. Ry. Co. v. Goodson*, 242 F. 2d 203, by Rives, Tuttle and Jones, with Judge Tuttle the organ of the court, accurately discussed and stated, and correctly applied the Texas doctrine of foreseeability.

It seems clear to me that in this maritime case the district judge correctly understood the principle obtaining and correctly applied it to find liability here. I would affirm the interlocutory decree both on limitation and exoneration of liability, without prejudice, however, to

the right of the petitioner, in defense of particular claims for damages, to offer such further evidence in each case bearing on the question of foreseeability as it may desire to offer.

It seems clear to me, also, that the majority has given too much and a wrong effect to the statement of the district judge, in note 3 in his opinion, where, after having stated in the body of the opinion that the master could and should have foreseen the danger of a disastrous fire, said in the note to his opinion at that point that the master could not have foreseen the explosion that occurred. With deference, to the contrary view of the majority, it seems clear to me that the district judge was distinguishing between *what the master, as a natural man and individual, actually knew as distinguished from what, as a representative of the ship and owner, he was required in law and ought to know.* A reading of the opinion as a whole, in which the district judge points out fully his reasons for denying the limitation, shows, I think, in the clearest way that the district judge, in the note, was making this distinction and was not contradicting his finding in the body of the opinion, that the master was charged with the knowledge and ought to have known and foreseen an explosion as a consequence of the situation which was then and there obtaining.

I respectfully dissent.

A true copy.

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

(Seal)

By CLAIR R. JAMES, Deputy

New Orleans, Louisiana, July 25, 1961.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

IN THE MATTER OF THE PETITION OF THE REPUBLIC OF FRANCE, AS OWNER, AND OF COMPAGNIE GENERALE TRANSATLANTIQUE, AS AGENT, OF THE STEAMSHIP "GRANDCAMP", IN A CAUSE OF EXONERATION FROM AND LIMITATION OF LIABILITY.	§ § § § § § § § §	ADMIRALTY NO. 1870

Mr. Clarence S. Eastham of Eastham, Dale & Forney, Houston, Texas; and Mr. Edwin Longcope of Hill, Betts & Nash, New York City, N. Y., for Petitioners;

Mr. William B. Butler, United States Attorney, and Mr. James E. Ross, Assistant United States Attorney, of Houston, Texas; and Mr. Dale M. Green, Department of Justice, Washington, D. C., for Claimant, United States of America;

Mr. Preston Shirley, of McLeod, Mills, Shirley & Alexander, Galveston, Texas, for Claimant Texas City Terminal Railway Company.

March 9, 1959

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This is a proceeding by petitioners, who allege that they are the owner, and agent or operator of the SS GRANDCAMP, for exoneration from or limitation of liability resulting from the fire upon, and explosion of, that vessel while she was loading a cargo of Fertilizer Grade Ammonium Nitrate at Texas City, Texas, April 16, 1947. This was the now famous Texas City Disaster of April 16-17, 1947, wherein in excess of 500 persons lost their lives, some 3,000 received personal injuries, and tremendous property loss was suffered.

In connection therewith, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Parties:

1. The petitioners are the Republic of France and the Compagnie Generale Transatlantique, First named petitioner is a political sovereign, and was owner of the SS GRANDCAMP on April 16, 1947, and for a matter of several months prior thereto. The second named petitioner (commonly known, and referred to hereafter, as the French Line) is a corporation organized under the laws of France, who operates vessels owned by the Republic of France under a contract (Contrat de Gerance), which is in evidence (Pet. Exh. 15). The French government owns in excess of eighty (80%) percent of the stock of the French Line, appoints a majority of its board of directors,

and in effect dominates and controls its management and operations.

2. There were originally many hundreds of claimants in the action. Those who remain are the United States of America and a relatively few others. The United States is claimant in a dual capacity. As successor to the Reconstruction Finance Corporation, it asserts a claim for loss of property in the amount of some $350,000.00. Far overshadowing this, however, it makes claim as assignee of many hundreds of claims for death, personal injury and property damage. These assignments were executed by the assignors in favor of the United States when, under the Texas City Relief statute (Chapter 864, Public Law 378, 84th Congress), the United States paid out approximately $16,000,000.00 to the victims of the disaster, or their beneficiaries. The United States seeks to recover not only what was paid, but asks recovery of the damages allegedly suffered by each of such assignors, in the amount of approximately $70,000,000.00.

3. In the initial stages of this proceeding, these assignors were likewise parties here, making claim in their own behalf, and in their own name, for the excess between the amount paid to them by the United States, and what they contended to be the extent of their damage. As the assignment in each instance was absolute and unqualified, these claimants were dismissed.

4. The claimants who remain (other than the United States) are those who did not accept under the Texas City Relief Statute, and did not assign to the government.

The Vessel:

5. The SS GRANDCAMP was an American built Liberty type cargo vessel 422.8 ft. in length, of 7,176 gross

and 4,380 net tons registered. She was acquired by the Republic of France from the United States Maritime Commission December 12, 1946. She was delivered to the French Line December 18, 1946, at New York.

6. In connection with the transfer of ownership, the GRANDCAMP underwent certain repairs, and was extensively surveyed and inspected. She was classed highest rating for vessels of her type by the American Bureau of Shipping, and by Bureau Veritas.

7. The SS GRANDCAMP made her first sailing after transfer to the French on January 11, 1947, carrying a cargo of coal from Newport News, Virginia, to Rouen, France. She sailed from Rouen for Antwerp on January 23, 1947, where she loaded cargo, and sailed from Antwerp February 4, 1947, for South American, Caribbean and Gulf ports. She arrived at Texas City, Texas, April 11, 1947, and berthed at Pier O, for loading of some 2,700 tons of Fertilizer Grade Ammonium Nitrate (FGAN hereafter). Until her arrival at Texas City, her history while in French hands had been without incident.

Others, Not Parties to the Litigation:

8. Charles De Guillebon was Master of the GRANDCAMP, having assumed command January 14, 1947. His service with the French Line began April 3, 1925. Prior to that time, he had attended the French Merchant Marine Officer training schools, served an apprenticeship of two years at sea, and had been licensed as Lieutenant for long sea voyages. He served as subordinate officer aboard various vessels until promoted to Master, Third Class, on January 1, 1947. He was rated consistently high by the Masters under whom he served. He was 47 years old when he died at Texas City in the explosion.

9. E. S. Binnings, Inc. was general freight agent for the French Line in all South Atlantic and Gulf ports, and had been for thirteen years prior to the disaster. Binnings was authorized to procure all usual and necessary repairs; to purchase supplies and other necessaries; to obtain and employ stevedores, and make all other arrangements necessary to the loading or unloading of French Line vessels; to handle personnel problems of crew members; to pay for services or supplies furnished French Line vessels; and to book cargo for transportation aboard such vessels. The company's main office is in New Orleans, Louisiana, with local offices in the principal Gulf ports. Its Houston office was managed by Olin Lacy; its Galveston office by Edward Westerman.

10. A. D. Suderman Stevedoring Company, an independent stevedoring concern, was engaged by Binnings to load the GRANDCAMP in Texas City. C. P. Suderman was the outside superintendent for the company, in charge of handling the cargo. Loading of FGAN onto the GRANDCAMP began at 2:15 p.m. on April 11, 1947, and continued until 8:20 a.m. on April 16, 1947, when Suderman ordered the stevedores out of the holds. At that time, approximately 1,450 tons of FGAN had been stowed in the No. 2 hold, and some 880 tons in the No. 4 hold.

11. Transports Maritime, a department and agency of the French government, was the source through which the French Line received its orders and instructions as to the operation of the government-owned vessels. Maurice Darondeau was the principal Officer of Transports Maritime in the United States, as Chief of its Shipping and Transport Operation in Washington, D. C. It was this department that arranged for the purchase of Liberty

ships, including the GRANDCAMP, from the United States Maritime Commission, following World War II. It delivered these vessels to the companies that would operate them, such as the French Line. This department then instructed the operators where the vessels were to be sent, with all ports of call to be made. Its purpose was to make available the necessary tonnage in every port where there was a cargo to be transported to France.

12. The French Supply Council was an agency of the Republic of France, located and maintained at Washington, D. C., charged with the duties of arranging for and facilitating the purchase of goods for the relief and rehabilitation of France. It secured priority allotments of FGAN from the United States, arranged the details for its shipment, and directed its movement to ports where French vessels were calling. It was in complete charge of all such activities for and on behalf of the French government in the United States.

13. J. D. Latta & Company was the freight forwarder of the FGAN. Shipments of the FGAN from the ordnance plants to Texas City on government forms of bills of lading named the French Supply Council as consignee, c/o J. D. Latta & Company. Latta had offices in Galveston, and forwarded the FGAN to the vessel's operators or agents.

The Fertilizer Program, and FGAN:

14. Ammonium nitrate, as one member of a larger family of "nitrates", has been an important item in world-wide commerce and industry for many years. By reason of its high free nitrogen content, it is an excellent fertilizer and plant food. In pure form, ammonium nitrate is a

powder, but it readily absorbs moisture, and has a tendency to harden and cake. Hence, in pure form it is difficult to handle and use as a fertilizer.

15. Ammonium nitrate also has been extensively used as a principal ingredient of high explosives, and the facilities of Tennessee Valley Authority, and of several ordnance plants, operated by the United States government during World War II, produced large quantities for this purpose. After the termination of hostilities, the United States, as an occupying power, undertook to extend aid to those areas of France formerly occupied by enemy forces. A number of the ordnance plants, previously deactivated, were reactivated for the purpose of producing and processing ammonium nitrate in fertilizer form. As time was required before such plants could reach maximum production, and with the need for such fertilizer in Europe being acute, in 1946 the United States government entered into a contract with a number of private producers of such ammonium nitrate fertilizer, substantially to the following effect. Such private producers (Lion Oil Company being the one here concerned) made available to the government for transfer overseas large quantities of such fertilizer which the private producers then had available; and the government agreed thereafter (and when its ordnance plants were back in production) to make available to the private producers the same quantity of fertilizer which they had advanced. The private producers were not required to accept the fertilizer themselves, but might dispose of it as they saw fit; and the government would deliver the quantity concerned upon their order.

16. To make pure ammonium nitrate more readily serviceable as a fertilizer, it was grained and coated to make "Fertilizer Grade Ammonium Nitrate". It was coated first

with .75%, to 1%, of a wax organic coating, either Wax B or PRP (.2% petrolatum, .4% resin, and .2% paraffin). This served to exclude moisture. Additionally, a dusting clay was added as an additional coating, to prevent stickiness. The clay was Kaolin, constituting about 4% of the end product. Hence, FGAN was composed of approximately 95% pure ammonium nitrate, 1% PRP, and 4% Kaolin. This was the same process, resulting in the same material, as had been used by private producers and "loaned" to the United States government previously. It was bagged in six-ply asphalt laminated paper bags, of a net weight of 100 pounds.

17. The FGAN here concerned was produced by Army ordnance plants, and was a part of a quantity repaid to Lion Oil Company under terms of the agreement heretofore mentioned. Walsen Consolidated Mercantile Company of New York, a broker, on behalf of private French interests, bought this quantity from Lion Oil Company. The French Supply Council, representing the French government, secured the necessary allocations for this fertilizer, and made all arrangements for its shipping, etc. This quantity was shipped on government bill of lading from the ordnance plants to Texas City, Texas, consigned to the French Supply Council, c/o J. D. Latta. After arriving by rail in Texas City, the FGAN was unloaded, warehoused by the Texas City Terminal, and was in the process of being loaded, in part upon the GRANDCAMP, and in part upon the HIGH FLYER, immediately prior to the disaster.[1]

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[1] The history of the fertilizer program, the composition, source, and inland transportation of the quantity of present concern is, I believe, without dispute. It is discussed in great detail in the opinion of the United States Supreme Court in **Dalehite v. U. S.**, pp. 1822 of 346 U.S., to which I refer.

Ammonium Nitrate:

18. Despite its use as a principal ingredient of high explosives, at the time of the disaster ammonium nitrate was not, and is not now, classified as an "explosive" for transportation purposes by the Interstate Commerce Commission or the Coast Guard. This is true because it was considered that to cause the detonation of ammonium nitrate, an initial shock or "booster" of considerable magnitude was required. The chances of such an initial or booster detonation being encountered in normal conditions of transportation has always been considered so remote as to be negligible.

19. However, ammonium nitrate—together with other nitrates—has long been known and recognized, not alone by scientists and chemists, but by all informed persons in the transportation industry, as an "oxidizing agent" and a *fire* hazard. It is now, and was long prior to 1947, classified by the Coast Guard as a "dangerous article" (46 C.F.R., 146.22-100; this reference, and others throughout, are to Coast Guard Regulations in effect, and as numbered, on April 16, 1957), and within the sub-class of "inflammable solids and oxidizing materials". An "oxidizing material" or "oxidizing agent" is one which, while not necessarily inflammable itself, decomposes when brought in contact with burning organic matter, and releases oxygen in quantity, thus supporting and encouraging the fire, and causing a more rapid rate of combustion, and an increase in temperature (46 C.F.R., 146.22-3). Similarly, where an oxidizing agent is present, the fire may not be extinguished by smothering or by eliminating outside sources of oxygen. This is so because abundant oxygen is supplied from the heating of the oxidizing agent.[2] Regulations for its handling

[2] This was graphically illustrated when one of the expert witnesses performed the following experiment in open Court,

and stowage are prescribed by Coast Guard Regulations (46 C.F.R., 146.01-1, et seq.).

The Disaster:

20. Prior to her arrival at Texas City April 11, 1947, the No. 4 Hold of the GRANDCAMP, in which the fire started, had been prepared to receive the FGAN by placing a layer of dunnage across the bottom and partially up the sides. This was covered with a layer of heavy paper. The bags of FGAN were stacked flat, one upon the other, building up layers of the bagged material from the bottom of the hold toward the top. At 8 o'clock a.m. of April 16, 1947, the longshoremen reported for work to continue loading the cargo of FGAN. They descended into the No. 4 Hold, which was then about half filled. At about 8:10 to 8:15 a.m. a thin whisp of smoke was discovered by one of the longshoremen, rising between the cargo battens and the inshore skin of the ship.[3] The longshoremen undertook to extinguish it by pouring their jug of drinking water upon it. This was unsuccessful, and one of the French crewmen brought a portable fire extinguisher. This

It was shown that a small quantity of ammonium nitrate, perhaps the contents of a teacup, would not ignite from the heat of an ordinary wooden match. The same was true of a similar quantity of FGAN. A comparable pile of wood sawdust could only be made to smolder, or burn very feebly, with a match; yet when the sawdust was mixed with the ammonium nitrate, the pile burned fiercely. The same was true when the sawdust was mixed with FGAN. There was no perceptible difference between the behavior of pure ammonium nitrate and FGAN in this respect. The evidence shows further that a fire of sawdust and FGAN, burning within a bottle, is not extinguished when the bottle is capped.

3—This was described by one of the first longshoremen to notice it as about as much smoke as would come from four or five burning cigarettes.

likewise failed to extinguish the fire. A fire hose (a part of the vessel's fire fighting equipment) was passed from the deck into the hold, but was never used. Several additional portable extinguishers were used without effect. During these early operations, the longshoremen removed several layers of the bags of FGAN in an effort to get at the source of the fire. They were never able to reach the source, though they could see it smoldering beneath them.

21. Despite these early attempts to extinguish the fire, it spread rapidly. Smoke and fumes in the hold became oppressive, and all personnel were ordered out. This was at about 8:20 to 8:25 a.m. Thereupon, the Captain ordered the hatch battened down and covered with tarpaulins, and ordered steam admitted into the hold by use of the vessel's steam smothering system. This was done at about 8:30 a.m. By this time, the Texas City Volunteer Fire Department was arriving, and began stretching their hoses from water lines ashore to the vessel.

22. Within the interval from about 8:30 a.m. to 8:40 a.m., the fire in the No. 4 Hold became much more intense. The hatch covers were partially blown off, and the interior of the hold was emitting great clouds of smoke and vapors. The longshoremen were off the ship. The crew had been ordered to leave the ship, and the Texas City Volunteer Fire Department was aboard and pouring water on the vessel.

23. The GRANDCAMP exploded at about 9:12 a.m., with tremendous force, and with devastating results. Fire and burning debris were spread throughout the waterfront, as result of which the HIGH FLYER caught fire, and exploded several hours later. Fires raged through refineries, gasoline storage tanks, chemical plants, etc., and

were not completely controlled for days. Of the 29 members of the Fire Department, two survived. Of the 41 members of the GRANDCAMP crew, 6 survived.

EXPLANATORY STATEMENT

The preceding findings are, I believe, without substantial dispute in the evidence. Of those which follow, dealing with negligence and fault, there is much conflicting testimony and impeachment of witnesses. In view of this circumstance, I consider it advisable, in the interest of clarity, to set out here the contentions of the parties in connection with two issues of fact which were the most bitterly contested on the trial, and which in my judgment are crucial to the case. They are as follows:

It is perfectly apparent now that FGAN is nothing more nor less than an impure grade of ammonium nitrate. It has the same characteristics as the pure product, though post-disaster investigations and scientific experiments have shown that the bagged FGAN is slightly more sensitive to fire and explosion than is pure ammonium nitrate. This is so because of the wax coating, and the presence of the bagging paper, which is an organic material and readily inflammable.

The petitioners recognize that, by reason of their long experience and position in the transportation industry, as a matter of fact they are charged with knowledge of the characteristics and propensities of ammonium nitrate and other nitrates. They recognize that as a matter of law they are charged with knowledge of the contents of the pertinent statute and Coast Guard Regulations (46 U.S.C.A. 170, et seq.; 46 C.F.R., 146.01-1, et seq.) which classify ammonium nitrate as an oxidizing material and inflammable solid, and, as such, as a "dangerous article". They urge very forcefully, however, the contention that the FGAN

was in truth and in fact a new product, which only recently had found its way into channels of world commerce. They say that as a matter of law the statute and regulations pertaining to ammonium nitrate did not and should not apply to FGAN; and as a matter of fact they say that the circumstances which prevail here were not sufficient to put a prudent person on notice or inquiry that the FGAN was or might be a fire or explosive hazard comparable to ammonium nitrate.

The claimants, on the other hand, urge to the contrary; that is, that the FGAN was simply an impure form of ammonium nitrate, and that it was covered by and subject to the same regulations. Claimants contend that under the terms of the statute and regulations, as well as a matter of fact, the petitioners were required to know the nature of their cargo, and to take adequate safety measures when in fact such cargo was hazardous. Additionally, they say that the circumstances here were such as to charge any prudent person with knowledge, or at least to put such person on inquiry, that the FGAN was essentially the same material as ammonium nitrate.

The second issue, which I conceive to be of primary importance, is the fact question as to the cause of the fire in the No. 4 hold. The petitioners have offered much expert testimony tending to show that the fire could, and likely did, result from so-called "spontaneous ignition". Reduced to its simplest terms, the expert testimony offered on petitioners behalf was that a quantity of ammonium nitrate will, when heated to a certain point, thereafter generate additional heat on its own, and thus increase the temperature of the mass after the source of outside heat is withdrawn. This is likewise true of FGAN, with its increased sentitivity to fire by reason of the coating and

bagging. The evidence shows that the FGAN was bagged at the ordnance plants at temperatures which, by some of the testimony approached, and by other testimony exceeded, the danger point in this respect. It is the petitioner's theory that when the quantity of FGAN was loaded in the No. 4 hold on the days preceding the disaster, the contents of the bags were very hot by reason of excessively high temperatures at which it was bagged at the ordnance plants; and as the bags were tightly packed one against the other, the mass tended to increase in temperature as mentioned above, until such time as combustion of the paper bagging and wooden dunnage took place.

The claimants contend that the more likely cause of the fire was careless smoking by the longshoremen in the hold, or perhaps by crew members on the deck. There is a sharp conflict in the testimony as to what, if any, precautions against smoking were taken by Captain De Guillebon, and as to whether smoking was permitted, or took place. There is considerable evidence tending to support each theory.

Negligence and Fault

24. The petitioners, as owner and operator of the GRANDCAMP (and with long experience in transporting cargoes of nitrates); the French Supply Council, as shipper; Captain DeGuillebon, as Master of the GRANDCAMP; E. S. Binnings, Inc., as the ship's agent; and A. D. Suderman Stevedoring Company, all are chargeable as a matter of fact and of law with knowledge that *ammonium nitrate* (as distinguished from FGAN) is and was an oxidizing agent; and a fire hazard; and that ammonium nitrate was a "dangerous article" within the purview of the statutes and Coast Guard Regulations dealing

therewith (46 U.S.C.A. 170, et seq.; 46 C.F.R. 146.02-3, 146.02-4, et seq.),[4]

25. The petitioner Republic of France, through its agencies, the French Supply Council and French Transport Mission, had actual knowledge, from the inception of the fertilizer program in the summer of 1945, to and including the day of the disaster, that the fertilizer furnished under this program, and referred to herein as FGAN, was essentially ammonium nitrate; and frequently referred to the commodity in correspondence concerning lend-lease requisitions, invoices, shipping instructions, and contracts of sale, simply as "ammonium nitrate", or occasionally as "nitrate" or "nitrate fertilizer".[5]

[4] The evidence shows that prior to the disaster there was an abundance of information available in the shipping trade as to the hazards of ammonium nitrate. In addition to the Coast Guard Regulations, some of the others cited were, "Modern Ship Stowage" by Leeming; "Dangerous Goods" by Aeby; "Seamanship for the Merchant Service" by Reisenberg; other sources of information were "Carriage of Dangerous Goods and Explosives in Ships" (1933) by the British Board of Trade (Gov't Exh. 15); National Board of Fire Underwriters summary of fire and explosive hazards of ammonium nitrate (1933) (Pet. Exh. 82); Regulations of the French Ministry of Public Transportation (1945) (Gov't Exh. 20); "Explosive and Fire Hazards of Ammonium Nitrate Fertilizer", U. S. Department of Agriculture Circular No. 719 (1945); U. S. Ordnance Safety Manual (1911). Additionally, reference is made to Technical Report 1658 of the Picatinny Arsenal (Pet. Exh. 81), published following the disaster, but listing many sources of information available prior to the disaster, dealing with the hazards of ammonium nitrate, and the precautions that should be observed in its handling.

The tremendous ammonium nitrate explosion at Oppau, Germany, in 1921, and the fires and explosions on board the vessels SS HALLFRIED in 1920, the SS MUENCHEN in 1931, and the SS GISLA in 1936, appear to have received widespread publicity in the shipping trade.

[5] The various documents composing Govt's Exhs. 8 & 9 are replete with instances wherein the heads of the various de-

26. J. D. Latta likewise had actual knowledge from the summer of 1945 forward that the product FGAN was essentially ammonium nitrate.

27. The petitioner, the French Line, Captain DeGuillebon, E. S. Binnings, Inc., and Robert Estachy, either had actual knowledge that the commodity FGAN was essentially ammonium nitrate, or had constructive notice of this fact. Circumstances shown by the evidence are such as to arouse the suspicion of any prudent person who was alert to the hazards of ammonium nitrate, and to put him on inquiry that FGAN well might present the same hazards.[6]

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partments, representing the Government of France in the acquisition and transportation of the commodity, refer to it in the manner stated.

[6] Some of the circumstances which would tend indisputably to show to any prudent and reasonably intelligent person that the FGAN well might be the same as ammonium nitrate are these:

(1) The very name of the commodity, **Fertilizer Grade** Ammonium Nitrate would tend to show it is merely an impure grade of ammonium nitrate.

(2) Each 100 lb. bag was marked in large type:

"FERTILIZER
AMMONIUM NITRATE"

or:

"AMMONIUM NITRATE
FERTILIZER". (Pet. Exh. 61).

(3) The cargo manifest for the GRANDCAMP, prepared by Binnings, refers to the commodity as "bags of ammonium nitrate fertilizer". (Gov't Exh. 3).

(4) The ocean bill of lading prepared "for the Captain of the vessel and on behalf of the Government of France," which was never executed because of the disaster, refers to the commodity as "ammonium nitrate fertilizer" (Pet. Exh. 54).

(5) The inland bills of lading (Gov't Exh. 23), under which the FGAN moved from the ordnance plant to Texas City refer to the commodity as "fertilizer compound, (Manufactured fertilizer) NOIBN, Dry, in paper bags." The petitioners lay great stress on the fact that the FGAN is described thus in each of these documents, and argue that there is nothing in

28. During the loading of the GRANDCAMP at Texas City on April 11-16, no adequate precautions were taken by her Master, her agent, or anyone else, to prevent smoking aboard the vessel. There were no signs posted prohibiting smoking (at least, none in English, and intelligible to the longshoremen). No ship's officer, or other person, was detailed to police the holds or the deck to prevent smoking.

29. By reason of the foregoing the longshoremen were permitted to, and did, smoke promiscuously in the No. 2 and No. 4 holds of the vessel and on the deck. Members of the crew smoked on the deck of the vessel.

30. The fire of April 16 resulted from this smoking by longshoremen in the No. 4 hold shortly after 8 a.m. of that date, and had its origin in a carelessly discarded cigarette or match.[7]

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such description to arouse suspicion, or to suggest that it is a **nitrate** fertilizer. In every instance, however, the description just quoted is followed on the bill of lading by the additional description "(Fertilizer Grade. Ammonium Nitrate)". The evidence shows that the description first quoted was used to qualify the product for a favorable railroad tariff.

(6) The New York Board of Fire Underwriters, in a letter to All Surveyors' well prior to the date of the disaster, advised that ammonium nitrate and ammonium nitrate fertilizer have the same characteristics, and for transportation purposes should be treated as the same commodity (Gov't Exh. 13). The evidence does not show whether a copy of this communication came to the attention of the parties here concerned.

It is interesting to note that Olin Lacy, Manager for Binings, was suspicious of the commodity. He made inquiry of his New Orleans office, of a friend at Lykes Bros., and perhaps of others, as to how the FGAN should be stowed, and whether any special precautions were required. As result thereof, he directed only that the FGAN be stowed separately from other cargo. He did not advise the Captain of any hazards of fire or explosion.

[7] Whether the fire on the GRANDCAMP began from spontaneous combustion, or as a result of careless smoking, has

31. The failure of the Master to promulgate and enforce "no smoking" regulations in the holds of the vessel, and upon the deck, constituted fault and negligence, which negligence had a direct and causal connection with the ensuing fire and explosion.

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been a hotly disputed issue not only in this trial, but in every investigation, hearing, and trial involving the disaster since its occurrence. The truth likely will never be known with any degree of certainty. It is noted that Judge Kennerly, of this Court, found spontaneous combustion to be the cause in his findings in **Dalehite v. U. S.** On appeal (**In Re Texas City Disaster Litigation**, (5th Cir.), 197 F. 2d 771), the Court reversed and rendered, with three of the six Judges (Chief Judge Hutcheson, Judges Borah and Strum) expressing the view that the trial court findings were clearly erroneous. The United States Supreme Court affirmed (**Dalehite v. U. S.**, 346 U. S. 15). Similarly, the FGAN explosion of the OCEAN LIBERTY in the harbor at Brest, France, July 17, 1947, was attributed by the trial court to spontaneous ignition (**Accinanto, Ltd. v. Cosmopolitan Shipping, Inc.**, 99 F. Supp. 261, Aff'd (4th Cir.) 199 F. 2d 134.

There is much scientific and technical opinion to the contrary. Of the view that spontaneous ignition was not the cause, and that careless smoking was the most plausible explanation of the source of the fire is the report of the Inter-Agency Committee (Quoted and Referred to in Pet. Exh. 82). This group of distinguished scientists was appointed by the Secretary of the Treasury following the disaster "to study every possible hazardous aspect of ammonium nitrate and develop additional information relative to such hazards in transportation, handling and stowage, and to recommend a national policy in conformity with these objectives". The Bureau of Mines Report (Pet. Exh. 82) contains an exhaustive study of all events leading up to the disaster, and contains among its other conclusions the following: "That fire caused by carelessness of men smoking is believed to have been the primary cause of the disaster." To the same general effect is the Picatinny Arsenal Report by Wm. H. Rinkenbach (Pet. Exh. 79). Exh. 82 likewise discloses that the findings of the Board of Investigation of the United States Coast Guard, made immediately following the disaster, were to the same effect (Pet. Exh. 82, p. 32).

32. The Master could and reasonably should have foreseen and anticipated the danger of a disastrous fire, with the *possibility* of explosion, in failing to prevent smoking in the presence or proximity of the FGAN. His negligence in

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Disregarding the opinion and findings of others for the moment, some of the circumstances which appear to me strongly to indicate careless smoking as the cause are (1) that a long period of time (probably several weeks) elapsed from the bagging of the FGAN at the ordnance plants until the disaster. During this interval the bags were loaded aboard freight cars, transported to Texas City and unloaded. There they were warehoused and again handled individually in being loaded aboard pallets for lifting aboard the vessel. The temperature was shown to have been generally cool for a number of days before the disaster, and there was ample time for cooling and dissipation of heat. While some of the longshoremen found the bags warm to the touch, they handled them without gloves, and the bags were not sufficiently hot to burn the hand. Additionally, when the longshoremen entered the hold the morning of April 16, no fumes, gasses or heat were encountered. This would have been expected if the FGAN was being decomposed from heat, and before a flame was present. Also, the fire, when discovered, was between the cargo battens and the skin of the ship, not in the center or an insulated area of the stowage. In a carefully conducted experiment, after the disaster, on a vessel similarly loaded with FGAN, the loaded FGAN showed no tendency to heat, and showed that the commodity varied in temperature with the surrounding atmosphere.

It is clear that a lighted cigarette or burning match readily could cause the bagging paper in contact with FGAN to ignite. While there was some impeachment of this testimony, a number of longshoremen testified as to the smoking in the holds of the GRANDCAMP during loading operations (TR. 694, 717, 832, 900, 911, 919 and 959). I cannot believe all of this testimony to be erroneous or false.

Finally, it is noted that one of the longshoremen (Spencer, TR. 958) testified that on the day before the disaster a small fire caused by a burning cigarette had broken out in the No. 2 hold, and had been promptly extinguished by the longshoremen.

this regard constituted a proximate cause of the fire, the resultant explosion, and the damages which ensued.

33. The recognized and accepted method of fighting a fire *in the presence of an oxidizing material*—both now and before the disaster—was to douse the fire with large quantities of water. This tends to cool the mass of oxidizing material, and to extinguish the burning organic matter. The use of the vessel's steam smothering system—a well recognized and generally effectice method of combatting a fire of organic materials in a ship's hold—is not effective in fighting a fire in the presence of an oxidizing material.

34. Captain DeGuillebon ordered that the fire hose, which was readily available in the No. 4 hold within moments after the fire was discovered, not be used, for fear of unnecessarily damaging the cargo. Later, after the men were driven from the hold by the intensity of the fumes and

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[5] In connection with this finding as to "foreseeability", it is undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry. What was not generally recognized before Texas City was (a) that ammonium nitrate would cause a detonation of such magnitude in the absence of great confinement and pressure (as within a bomb), and (b) that fire and heat alone would cause such detonation, without an initial or booster detonation; or, according to one theory, with such initial detonation resulting from an explosion of accumulated gases, which in turn come from the heated and decomposing ammonium nitrate.

From the literature and information generally available, I do not believe that, in the exercise of ordinary care, the Master could have foreseen the probability of an explosion **of this sort,** even in the presence of fire. This finding should be interpreted in this light, and is based on the premises that, as he could foresee danger from fire from his negligent conduct, the "foreseeability" test is met, and it is not necessary that he be able to foresee the **extent** of the damage which may ensue.

smoke, he ordered the hold and venilators closed, and steam injected into the hold in an attempt to smother the fire. This had the effect of raising the temperature of all the oxidizing material within the hold, and of confining the resulting gases and fumes. The fire thus became more intense, and in a few minutes was beyond the control of the ship's personnel and of the Texas Gity Fire Department.

35. I find the Master to have been negligent and at fault in failing to make use of the fire hose to quench the fire in its incipient stage; and in using steam in an effort to smother the fire after it had progressed to a point of dangerous proportions.[9]

36. This negligence constituted a proximate cause of the disaster and the ensuing damage, in that it appears highly probable that the prompt use of copious quantities of water from the hose would have extinguished the fire in its early stages.

37. In hoisting the bags of FGAN from the wharf by means of pallets, and lowering same into the holds of the GRANDCAMP, from time to time some of the paper bags

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[9] One now may only speculate as to what passed through the mind of Captain De Guillebon in the relatively short period available to him in combatting the fire. From his training, and from the precautions against fire which were taken in loading cotton in Houston April 7-10, one would conclude that the Captain was not a careless person.

After much thought, I am convinced that the truth of the matter is this. The negligent conduct of those present on the waterfront immediately before the disaster did not stem from any failure to connect FGAN with ammonium nitrate in their own thinking. Rather, I think it clear that none of them—De Guillebon, Lacy, Suderman or Latta—in fact recognized the dangers inherent in ammonium nitrate. While, as heretofore noted, there was a wealth of information available in connection therewith, **as to these individuals** ammonium nitrate was a new cargo. The same is true, I think, of Estachy.

became torn and broken. The longshoremen in the hold did not refuse these bags, or return them for re-bagging, but loaded them as best they could aboard the vessel. By this means, there was much spillage of the contents.

38. The acceptance of such broken bags aboard the vessel constituted a violation of Coast Guard Regulation 146.02-14, and constituted fault and negligence on the part of the Master.

39. This fault and negligence was a proximate and contributing cause of the disaster, in that the presence of such loose and unbagged FGAN increased the susceptibility to fire of the stow, the dunnage, and bagging paper.

40. At the time of, and immediately before, the disaster, the SS GRANDCAMP was unseaworthy because not properly manned, in that her Captain was unaware of the nature of the cargo which she was in the process of receiving, of its dangerous propensities, or how to guard against or combat such dangers.

41. The petitioner Republic of France was "in privity and knowledge" with the unseaworthy condition referred to in the finding next above, in that through the French Supply Council, as shipper, she failed to comply with Coast Guard Regulation 146.05-13, directing that the shipper of a dangerous cargo furnish information with respect thereto to the vessel or her agent.

42. The petitioner French Line was "in privity and knowledge" with the unseaworthy condition referred to in Finding No. 40 above, in that she failed to know or to learn, from information readily available, the nature and character of the cargo accepted, and neglected and failed to inform the Master fully in connection therewith."[10]

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[10] Robert Estachy was the superintendent for the French Line in the Southern United States in charge of all business of the line from Charleston to the Mexican border. His head

43. At the time of, and immediately before, the disaster, the SS GRANDCAMP was unseaworthy in that she was dangerously and improperly loaded by reason of the presence in Hold No. 4 of a number of broken bags of a "dangerous article", with the contents thereof spilled, as forbidden by Coast Guard Regulation 146.02-14(a).

44. Petitioner the French Line was "in privity and knowledge" of such unseaworthy condition, in that Robert Estachy, in charge of all of the Line's business in Gulf and South Atlantic ports, had personal knowledge of the habit of the loading of FGAN in a loose and bulk condition when the bags were broken, and acquiesced in the practice.

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quarters were in New Orleans. He worked in very close touch with E. S. Binnings in husbanding all of the French Line vessels in the various Gulf and South Atlantic ports.

Estachy was familiar with I.C.C. Regulations, and with Coast Guard Regulations, and in general with those dealing with dangerous cargoes.

The GRANDCAMP was the third French Line vessel to load FGAN at Texas City, having been preceded by the matter of a few months by the ARGENTAN and the LIEUTENANT LEMURR. Estachy had gone to Texas City when the movement of fertilizer began "to see what was going on on the first one."

In observing the loading of the earlier vessels, Estachy saw that many of the bags were broken, and, much such loading was done with shovels. "It was more bulk than bag cargo." Estachy knew that it was fertilizer that was being loaded, and the shipping documents showed that it was ammonium nitrate fertilizer. He had general information concerning the cargo of Chilean nitrates to France before the war, for use as a fertilizer, but was not familiar (before the disasters) with "oxidizing materials" and did not know that nitrates were a hazardous cargo because no one had ever told him that such was the case.

Of course he gave no warning to Captain De Guillebon, or anyone else, concerning the cargo aboard the GRANDCAMP.

45. The petitioner Republic of France, through the French Supply Council, as shipper, while possessed of actual knowledge of the characteristics of the cargo, failed to furnish to Binnings, the ship's agent, or to the Master of the GRANDCAMP, a written "originating shipping order", informing them or either of them of the characteristics of the cargo of FGAN, in advance of the tender of the cargo to the vessel for loading, as required by Coast Guard Regulation 146.05-13 (46 C.F.R.).

46. This failure to furnish the information thus called for constituted negligence on the part of the French Supply Council, and the petitioner Republic of France.

47. Such negligence in failing to furnish the information thus called for was a proximate and contributing cause of the disaster and the ensuing damage.

48. The petitioner French Line was at fault in accepting a cargo which it knew, or should have known, to be a "dangerous article" without demanding from the shipper an originating shipping order containing the shipper's certification that compliance was had with §146.05-11, as required by Coast Guard Regulation 146.06-1 (46 C.F.R.).

49. The GRANDCAMP was loading, or had loaded, her principal cargo for return to France in the Houston-Texas City- Galveston area, and was scheduled thereafter to return to France.

50. At all material times, the petitioner the French Line, under terms of the Contrat de Gerance (Pet. Exh. 15), was a charterer or owner *pro hac vice* of the SS GRANDCAMP, manning, victualing and navigating the vessel by its own procurement.

51. The United States Government was the manufacturer, supplier, and inland shipper of the quantity of

FGAN herein involved, and placed the product in the channels of commerce. The rail transportation from the point of manufacture to Texas City complied in all respects with I.C.C. regulations. Without determining whether the United States may have been at fault in any particular in connection with the manufacture or shipping of the FGAN, or, if so, the effect thereof as to the various types of claims which the United States asserts, if there be such negligence it was not the *sole* cause of the disaster (as petitioners contend).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this proceeding.

2. The petitioner Republic of France is entitled to petition for exoneration from or limitation of liability under 46 U.S.C.A., §183, as owner of the GRANDCAMP.

3. Under its Contrat de Gerance (Pet. Exh. 15), the petitioner French Line was charterer of the GRANDCAMP within the terms of § 186 of Title 46, U.S.C.A., in that she manned, victualed and navigated the vessel by her own procurement, and hence is entitled to petition for exoneration from or limitation of liability (*In Re Petition of the United States* (3rd Cir.) 259 F. (2) 608).

4. The petitioner, the French Line, as carrier, was under the duty to use due care to ascertain the nature and characteristics of the cargo accepted, and, as a matter of law, chargeable with the knowledge which reasonable inquiry and investigation would have disclosed (*The Willfaro*, 9 F. (2) 940; *The Richelieu*, (4th Cir.) 48 F. (2) 497; *Anderson v. Lorentzen* (2nd Cir.) 160 F. (2) 173). The French Line breached this duty in the particulars heretofore set out (see particularly Fact Findings 27, 40, 42)

(*Texas & Gulf SS Co. v. Parker*, (5th Cir.) 263 F. 864; *The Silver Palm* (9th Cir.) 94 F. (2) 776).

5. The French Supply Council, as shipper, breached its statutory duty to give warning of the nature of the dangerous cargo tendered (See particularly Fact Findings 25, 41, 45); and its relation with the petitioner Republic of France, was such, as a matter of law, to render that petitioner responsible for and in privity with such fault.

6. While E. S. Binnings & Company was general freight agent for the petitioner French Line in Gulf ports, the relation was not such as to constitute Binnings a "managing Agent" within terms of § 183(e), Title 46, U.S.C.A.

7. Robert Estachy, as superintendent for the French Line in Gulf and South Atlantic ports, was in general charge and supervision of all of the line's activities within that area; and was "superintendent or managing agent" of petitioner the French Line within the terms of § 183(e), Title 46, U.S.C.A. (*Cornell v. Phipps*, 317 U.S. 406; *The City of Brunswick*, 6 F. Supp. 597.

8. Coast Guard regulations and related statutes (heretofore referred to in the Findings of Fact) classifying and referring to ammonium nitrate as a "dangerous article" should be interpreted and construed as applying as well to fertilizer grade ammonium nitrate which, as heretofore found, was essentially the same commodity.

9. The "voyage" here in question, within terms of §183(e), Title 46, U.S.C.A., was the one-way crossing contemplated from Houston-Galveston to France, upon which the GRANDCAMP was about to embark at the time of the disaster (*Benedict on Admiralty*, 6th Ed., Vol. 3, p. 400, and cases there cited).

10. Under Admiralty Rule 56, petitioners here were entitled to implead the United States in this proceeding, and the motion to that end is allowed.

11. During the trial, testimony was tendered by petitioners as to the circumstances surrounding the loss of the OCEAN LIBERTY. This testimony was substantially to the effect that some two months after the Texas City disaster, the OCEAN LIBERTY was loaded at Baltimore with a partial cargo of FGAN, some of which was of the same origin as that at Texas City; by reason of the recent disaster, every precaution was taken in the loading of the FGAN aboard the OCEAN LIBERTY; after the loading the hatch or hatches containing the FGAN were closed, and not reopened during the voyage; while unloading in the harbor at Brest, France, immediately following the crossing, smoke was noticed coming from the ventilators of the holds in which the FGAN was stored; the Master had the ventilators closed, the hatches secured, and steam injected into the holds in an effort to smother the fire, and efforts were made to remove the vessel from the harbor; she ran aground after being moved part way out of the harbor; the fire became much more intense, and there was much smoke, gas and fumes; efforts to sink the vessel in the shallow water were unavailing, and she exploded under circumstances much like those of the GRANDCAMP disaster.

This testimony was offered as tending to show an explosion strikingly similar to that of the GRANDCAMP, and where there was little opportunity for any foreign matter to have entered the hold and caused the fire. This tended to support the theory of spontaneous ignition.

Objection was made by the United States that there was not sufficient similarity shown for the evidence to be of any probative value; and, further, for the reason that

(so counsel stated) there was a certain secret cargo aboard the OCEAN LIBERTY, the nature of which had never been disclosed, and it was suggested that this well may have been of such nature as to have caused the fire. I reserved ruling on all of such testimony; and it was received subject to objection.

It is my view that the objection goes to the weight to be given the testimony, rather than its admissibility; and I have considered the evidence and given it such weight as in my judgment it warranted.

12. From the foregoing, it follows that by reason of the fault and negligence of the petitioners, and the unseaworthiness of the vessel, all of which was within the privity and knowledge of petitioners, neither is entitled to exoneration from or limitation of liability under §183, Title 46, U.S.C.A.

Clerk will furnish counsel copy of the foregoing Findings and Conclusions.

Done at Houston, Texas, this 9th day of March, 1959.

/s/ BEN C. CONNALLY
United States District Judge

JUDGMENT

Extract from the Minutes of May 5, 1961.

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE,

No. 18064 versus

UNITED STATES OF AMERICA, ET AL.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the steamship Grandcamp. "Hutcheson, Circuit Judge, Dissenting."

...Y
...E COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 7 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 594

UNITED STATES OF AMERICA,
Petitioner,
v.
REPUBLIC OF FRANCE and COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondents.

No. 595

TEXAS CITY TERMINAL RAILWAY COMPANY,
Petitioner,
v.
REPUBLIC OF FRANCE and COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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No. 595

TEXAS CITY TERMINAL RAILWAY COMPANY,

Petitioner,

v.

REPUBLIC OF FRANCE and COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

Both of the entitled causes arise out of the same proceeding in which the petitioners were claimants against the respondents, the Republic of France and Compagnie Generale Transatlantique. The two petitions make substantially the same arguments to this Court, with the Texas City Terminal Railway Company admittedly following the lead of the petitioner, the United States. This brief is submitted in opposition to both petitions.

Statement

The opinion of the Court of Appeals for the Fifth Circuit, 290 F. 2d 335, from which petitioners herein seek review by certiorari, arises out of a limitation proceeding filed in admiralty jointly by the Republic of France and Compagnie Generale Transatlantique, as owner and operator, respectively, of the ill-fated steamer GRANDCAMP. That vessel exploded at Texas City, Texas, on April 16, 1947, in the course of loading a cargo of fertilizer ammonium nitrate (FGAN) manufactured and supplied by the United States. The explosion was preceded by a fire and set off the chain of events which has since become known as the Texas City Disaster. Following the disaster the respondents herein filed limitation of liability proceedings in the District Court for the Southern District of Texas, pursuant to the provisions of the Limitation of Liability Act, 46 U.S.C. 182 *et seq.*, seeking exoneration from or limitation of liability for the consequences of the disaster.

Both of the petitioners herein filed claims in the limitation proceedings instituted by respondents. The United States claimed, primarily: as assignee of the disaster victims who received payments under the Texas City Relief Statute of 1955 (Chap. 864, P.L. 378, 84th Cong.) and also as successor to the Reconstruction Finance Corporation, for loss of warehoused cargo valued at $350,000. The other petitioner, Texas City Terminal Railway Company, is the only other claimant who remained in the limitation proceedings at the time of trial. All other claimants had withdrawn or their claims had been dismissed as having been assigned to the United States.[1]

[1] In a prior case arising out of the same explosion, *Dalehite v. United States*, 346 U. S. 15, to which the U. S. was a party but the respondents herein were not, this court held the United States, which

Except for a group of local firemen killed on board the vessel at the time of explosion, whose rights are governed by the Texas Death and Survival Statutes, all of the victims for whom the petitioner, the United States, speaks were injured on shore and not on the vessel, and are non-maritime claimants. The United States has claimed to recover against respondents not simply the $16,000,000 it paid out to these disaster victims, but approximately $70,000,000, representing the aggregate amount of the victims' asserted claims.

Upon the trial of the limitation proceedings the District Court, 171 F. Supp. 497, found the respondents herein negligent on several grounds and denied limitation as to both. The District Court also allowed a motion of the respondents, under the 56th Admiralty Rule, to implead the United States as a party liable over to the respondents without, however, going into the merits of the impleaded party's liability, if any, beyond the finding that negligence of the United States was not the sole cause of the disaster, as had been contended by the respondents.

The Court of Appeals, sitting *en banc*, found it unnecessary to review the trial court's findings of negligence, or the impleader of the United States, because, on the basis of the trial court's own findings of fact with respect to foreseeability, it concluded that as a matter of law the Texas test of foreseeability was not satisfied and the necessary element of proximate cause was not present. 290 F. 2d 395, 398-401. Accordingly, it directed the entry of judgments of exoneration in favor of the respondents. Judge Hutcheson dissented. 290 F. 2d 395, 401.

Thus, despite the magnitude of the disaster, the large number of assigned claims, the sovereign character of

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was the manufacturer and supplier of the cargo which exploded on board the GRANDCAMP, not liable to the disaster victims under the Federal Tort Claims Act, 28 U.S.C. secs. 1346 & 2674, since the conduct complained of against the United States fell within the discretionary exemption of the Act.

two of the parties, and the very substantial damage sums involved, these proceedings as they now stand are no more than another negligence case, albeit a sensationally big one, and the only legal point passed upon by the Court of Appeals was the application of the Texas law of proximate cause to the particular facts of the case. There is no reason for the Court of Appeals decision to be cited for anything else than its reading of the Texas law of proximate cause.

The Petitions Do Not Satisfy the Requirements of Rule 19

Viewed in its true posture this case does not present any special or important reasons for the granting of writs of certiorari, nor is there presented here any issue that meets the established criteria for review by certiorari within Rule 19 of this Court.

No federal question is involved, despite petitioners' effort to make the contrary appear. The decision of the Court of Appeals for the Fifth Circuit is not in conflict with the decision of any other court of appeals.[2] No

2. In fact the only comparable decision of another Court of Appeals, that of the Court of Appeals for the 4th Circuit in *A/S J. Ludwig Mowinkels Rederi v. Accinato, Ltd.* (The Ocean Liberty) 99 F. Supp. 201, rev. 199 F. 2d 134, 138; cert. den. 345 U. S. 992, held that there was no negligence on the part of the vessel owner who loaded a cargo from the same lot of material (fertilizer ammonium nitrate—FGAN, so called) which exploded on the GRANDCAMP, after the Texas City explosion, and in light of all the precautions thought to be necessary by federal and local officials by reason of that event. A fire and explosion on the OCEAN LIBERTY in the port of Brest, France, nevertheless occurred, much as at Texas City. The holding was predicated upon a finding that the explosion occurred as a result of spontaneous combustion of the cargo, a new product, a result which could not have been reasonably foreseen by the carrier. This same point was urged by these respondents upon the trial court in the instant case and rejected by it. The same point was urged on appeal but became academic because the Court of Appeals disposed of the case on the issue of proximate cause.

important state or territorial question has been decided in a way in conflict with applicable state or territorial law. And there has been no construction or interpretation, of any federal law which is called into question by the petitions for certiorari.

There is No "Question Presented" Under the Admiralty Extension Act

The petitioners for certiorari here have attempted to fill the vacuum which the true posture of the case presents under Rule 19 by creating a bogus question. The two "questions presented" by the brief of petitioner, the United States (page 2, U. S. brief), are merely two formulations of one proposition turned inside out. The United States postulates "questions" whether a shipowner is relieved from liability for foreseeable negligent injury to others, whether federal maritime law or local state law governs such a question, and whether the Admiralty Extension Act was overlooked. All of this boils down to one strained assertion: that if the Admiralty Extension Act, 46 U.S.C. 740, had been considered, a different law than that applied by the District Court and the Court of Appeals would have been applicable and would have produced a different result.

There are a number of reasons why this formulation is unsound.

First: The purported "questions" posed by the petitioners distort the issue before the Court of Appeals. That question was not whether "under general maritime law" a shipowner is relieved from the foreseeable result of negligent injury; it was rather whether under Texas law (or general maritime law) a shipowner or anyone else could be held liable to persons toward whom the law

of foreseeability created no duty; whether any duty existed giving rise to an action for its breach. This reproposition, not the bogus proposition posed by the petitioners, the Court of Appeals determined by reference to settled Texas precedent.

Second: The Court of Appeals, and for that matter the District Court, were not requested by the petitioners to apply the Admiralty Extension Act. That statute was not pleaded and was not placed in issue before either court, a matter which is conceded by petitioner, the United States, at page 17 of its brief. Consequently, there was no occasion to pass upon the point and no precedent has been set by the Court of Appeals with respect to such statute.

Third: The Admiralty Extension Act, which was enacted more than a year after this disaster occurred, did not purport to and could not create new substantive law retroactively. It merely made available admiralty jurisdiction and admiralty remedies for non-maritime torts not previously cognizable in admiralty. *United States* v. *Matson Nav. Co.*, 201 F. 2d 610, 617 (C.A. 9); *All America Cables & Radio* v. *The Viceppo*, 93 F. Supp. 923 (S.D. N.Y.). The application of the Admiralty Extension Act would in no way have altered the substantive law to be applied to this case, *i.e.*, the law of Texas. The Admiralty Extension Act did not convert non-maritime torts into maritime torts but simply brought both classes of torts into the admiralty forum for adjudication. In this case *all* claims were already in admiralty by virtue of the proceeding filed pursuant to the Limitation of Liability Act, which provides a form of proceeding long recognized as affording a concursus for all claims, maritime and non-maritime, arising out of the event as to which limitation of liability

is invoked. Similarly, the Limitation of Liability Act did not convert non-maritime torts into maritime torts, but simply brought both classes of torts into the admiralty forum for adjudication.

In *Richardson* v. *Harmon*, 222 U. S. 96, this Court, in construing the amendment of 1884 to the Limitation of Liability Act, held that non-maritime as well as maritime claims may be brought into concursus in a limitation proceeding.

Subsequently, in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, this Court stated that

> "The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res, and by judgment in personam against the owners, so far as the court may decree." (p. 217)

> "* * * All the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court * * * It looks to a complete and just disposition of a many cornered controversy * * *" (p. 216)

Again, in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, this Court stated

> "The heart of this system [limitation of liability] is a concursus of all claims to insure the prompt and economical disposition of controversies in which there are often a multitude of claimants." (p. 415)

The opinion of this Court in *British Transport Commission* v. *United States*, 354 U. S. 189, reflects the most recent pronouncement of the Court on the scope of limitation proceedings as providing a forum for adjudication of

all claims arising out of a single disaster. This Court there upheld a decision of the Court of Appeals for the Fourth Circuit that a claimant against the petitioner in a limitation proceeding can be impleaded and cross-claimed against by other claimants in the proceeding. In so deciding this Court made the following comment on the guiding principles as to the scope of limitation proceedings to bring all claims into concursus:

> "* * * But reason compels the conclusion that if the court had power to administer justice in the event the Commission had won, it should have like power when it lost. Whether it is by analogy to Rule 56 or by virtue of Rule 44, or by admiralty's general rules heretofore promulgated by this Court, we hold it a necessary concomitant of jurisdiction in factual situations such as this one that the Court have power to adjudicate all of the demands made and arising out of the same disaster. This too reflects the basic policy of the Federal Rules of Civil Procedure. Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices."

The Admiralty Extension Act, even if it had been in existence at the time of the disaster, would not have contributed in any way to give the District Court jurisdiction to deal with the claims of the petitioners, for the Court clearly had jurisdiction under the Limitation of Liability Act and the above cited decisions of this Court construing the application of that act.

Fourth: Petitioners, though attempting to suggest that the Admiralty Extension Act would make general maritime law applicable, in contrast to local law, *i.e.*, the law of Texas, do not offer a scintilla of authority to support

this contention or to show that the general maritime law of proximate cause differs from that of Texas and would produce a different result here.

CONCLUSION

It is submitted that not only are affirmative grounds for the granting of certiorari lacking here, but that there are sound reasons for declining certiorari:

1) the decision below rests entirely upon state decisional law, which governs all claims asserted in the limitation proceeding and which has been properly applied by the Court of Appeals;

2) the purported questions for review were not presented to the courts below, but are raised here for the first time.

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Republic of France and Compagnie
Generale Transatlantique.

EDWIN LONGCOPE,
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Certificate

I hereby certify that I have served a copy of this brief in opposition to petitions for certiorari upon:

The Solicitor General
Department of Justice
Washington, D. C.
Attorney for the United States of America

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Galveston, Texas
Attorney for Texas City Terminal
Railway Company

on the day of February, 1962 by depositing the same in regular United States mail, air mail, first class, properly addressed and with postage attached.

EDWIN LONGCOPE

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Edwin Longcope